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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-621

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, FEDERAL MUTUAL INSURANCE COMPANY, and LUMBERMENS MUTUAL CASUALTY COMPANY,

Petitioners,

against

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 5, 1971

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, American Manufacturers Mutual Insurance Company, American Motorists Insurance Company, Federal Mutual Insurance Company, and Lumbermens Mutual Casualty Company, respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 15, 1967 and August 10, 1971.

Opinions Below

The opinion of the District Court dated August 14, 1963 denying defendant's motion to dismiss the complaint is reported at 221 F. Supp. 848. The opinion of the District Court dated May 31, 1967 granting defendant's cross-motion for summary judgment is reported at 270 F. Supp. 619. The opinion of the United States Court of Appeals for the Second Circuit dated December 15, 1967 reversing the grant of summary judgment is reported at 388 F.2d 272 and is set forth in Appendix A. The opinion and order of the District Court dated March 17, 1970 dismissing the complaint after trial is not officially reported and is unofficially reported at 1970 Trade Cases ¶73,110 and is set forth in Appendix B. The opinion of the United States Court of Appeals for the Second Circuit dated August 10, 1971 affirming the judgment of dismissal is officially reported at 446 F.2d 1131, and is set forth in Appendix C.

Opinions were also rendered in a related action brought by American Broadcasting-Paramount Theatres, Inc. in the New York State Supreme Court to enforce the contract involved in this litigation. Special Term of the New York Supreme Court declined to adjudicate the defense of contract invalidity under the federal antitrust laws. *American Broadcasting-Paramount Theatres, Inc.* v. *American Mfrs. Mutual Insurance Co.*, 42 Misc.2d 939, 249 N.Y.S.2d 481 (Sup. Ct. N.Y. Co. 1963), *affirmed*, 20 A.D.2d 890, 251 N.Y.S.2d 906 (1st Dept. 1964). Trial Term of the New York Supreme Court granted judgment for American Broadcasting-Paramount Theatres, Inc. after trial on the issue of damages. 48 Misc.2d 397, 265 N.Y.S.2d 76 (Sup. Ct. N.Y. Co. 1965), *affirmed*, 24 A.D.2d 851, 265 N.Y.S.2d

577 (1st Dept. 1965). On a single appeal the New York Court of Appeals affirmed both Appellate Division orders of affirmance. 17 N.Y.2d 849, 218 N.E.2d 324, 271 N.Y.S.2d 284 (1966). Mr. Justice Harlan granted a stay of the State Court judgment pending decision on Kemper's Petition for Certiorari, 87 S. Ct. 1, 1966 Trade Cases ¶71,850. Cert. was denied on November 7, 1966, 385 U.S. 931 (1966).

Jurisdiction

The judgment of the United States Court of Appeals dated August 10, 1971 was filed on August 10, 1971, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Petitioners also seek review of so much of the opinion of the United States Court of Appeals for the Second Circuit dated and filed on December 15, 1967 on the earlier appeal as affects said judgment of August 10, 1971. The earlier decision is within the scope of review on this petition. *Mercer* v. *Theriot*, 377 U.S. 152 (1964); *Hamilton Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251 (1916).

Question Presented

1. In order to establish a tie-in in violation of Section 1 of the Sherman Act, must a buyer *in addition to proving* that, in response to his repeated demands throughout a month to buy some products separately from a package of products offered by a seller, (a) seller refused to make the desired products available at prices equivalent to their package price (apart from differentials, if any, justified

by costs) and (b) seller stated that the desired products could be purchased separately from the package only at "exorbitant" prices, *also prove* that he, the buyer, "persevered" sufficiently in his demand to purchase separately to impose on the seller a duty of making a firm offer for the desired part of the package?

Statutory Provision Involved

15 U.S. Code §1

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: • • • ."

Statement of the Case

Petitioners, who have been referred to throughout this litigation as the "Kemper Insurance Companies" or simply "Kemper," entered into an agreement dated August 15, 1962 with respondent American Broadcasting-Paramount Theatres, Inc. (hereinafter "ABC") for the sponsorship of a television program "Evening Report" (B2).•

The essence of Kemper's claim is that in response to Kemper's repeated demands throughout a month that ABC eliminate from the ABC station lineup 32 of the 99 ABC affiliated stations carrying Evening Report, ABC conditioned the sale of Evening Report to Kemper over the

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• References such as "A1" or "B1" are citations to pages in the respective appendices to this petition. References such as "30a" are to the Appendix for Plaintiffs-Appellants dated March 31, 1971. References such as "Pl. Supp. Ex. 24" are to the exhibits submitted to the United States Court of Appeals for the Second Circuit.

desired stations on Kemper's purchase of Evening Report over the 32 unwanted stations. This tie-in of sponsorship rights and air time on 32 unwanted stations to sponsorship and air time on the wanted stations is claimed to constitute a violation of Section 1 of the Sherman Act, 15 U.S.C. §1. The amended complaint seeks treble damages based on the amount Kemper was compelled to pay by the State Court judgment to ABC enforcing the August 15, 1962 agreement for those telecasts of the program without Kemper commercials which were broadcast after Kemper had cancelled the contract (30a-34a).[1] Federal jurisdiction is predicated on Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26.

On May 31, 1967 District Judge Tenney of the United States District Court for the Southern District of New York granted ABC's cross motion for summary judgment and dismissed the complaint on the grounds that only a single product was involved and that "the necessary element of coercion, economic or otherwise, has not been proven." On December 15, 1967 the Court of Appeals for the Second Circuit reversed the District Court and held that there were triable issues whether there were one or two products, whether ABC's request for a higher price for fewer stations was cost justified and whether it was reasonable to have required Kemper to attempt to negotiate further for its desired station lineup after ABC

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[1] Thus this is not a case where a promissor is attempting to avoid paying an agreed price for a consideration the promissor had actually received. Cf. *Kelly* v. *Kosuga*, 358 U.S. 516 (1959). The amount of the state court judgment against Kemper was $265,047.20 (*American Broadcasting—Paramount Theatres, Inc.* v. *American Manufacturers Mutual Insurance Co.*, 48 Misc.2d 397, 265 N.Y.S.2d 76 (Sup. Ct. N.Y. Co. 1965), *affirmed* 24 A.D.2d 851, 265 N.Y.S.2d 577 (1st Dept. 1965), *affirmed* 17 N.Y.2d 849, 218 N.E.2d 324, 271 N.Y.S.2d 284, *stay granted*, 87 S. Ct. 1, *cert. denied*, 385 U.S. 931 (1966).

rejected its order for the desired lineup. The Court of Appeals remanded for a trial on the limited issue of "whether it was reasonable for Kemper not to have attempted to negotiate further," stating that a negative answer on that issue would obviate the need for resolution of the other issues of product identity and cost justification for ABC's price differentials.

District Judge Tenney in an Opinion dated March 17, 1970, found after trial on the single mandated issue that in 1959 Kemper had prepared an analysis showing the number of Kemper agents, premium volume and television coverage (the percentage of TV homes in each county that watched a particular station) in each county in the United States. A list of television markets throughout the United States was then prepared in the order of their importance based on premium volume in counties with a better than 40% television coverage (B10, B11). This analysis was updated between mid-March and May 1962 in connection with the negotiations with ABC for Evening Report (B11).

The District Judge found that Kemper's desire to eliminate certain unwanted stations was made known to ABC on the following occasions:

1. On the morning of April 17, 1962, before making a presentation to Kemper an officer of Kemper's advertising agency showed to an ABC vice president a brochure dated April 17, 1962 to which was attached a list of stations, of which 20 were designated as "markets Kemper does not want" (B7, B10, B50).

2. At that time, ABC and the advertising agency "discussed the fact that there were some stations which were not wanted" (B8, B50).

3. At another meeting later on April 17, 1962 between representatives of ABC, Kemper, and the agency: "Admittedly, there was discussion about the 20 unwanted stations . . ." (B11, B50).

4. With respect to a meeting between representatives of the parties on April 27:

> "Mr. DeMark [a Kemper official] testified that he again indicated he did not want certain stations and that Mr. Nordmark or Mr. Gillogly [ABC officials] indicated that they would 'try it out' in New York" (B19).

5. On or about May 4, 1962 Kemper's advertising agency on instructions from Kemper sent Kemper's first order letter to ABC which eliminated 32 stations from the ABC station lineup carrying Evening Report and ordered only the stations desired by Kemper (B20).[2]

6. At a meeting between representatives of the parties on May 18, 1962 "Mr. DeMark [of Kemper] said that the existing lineup [i.e., the full package lineup] had certain stations Kemper did not want * * *" (B26).

ABC's Salesman, Nordmark testified that a day or so after May 10, an officer of Kemper's advertising agency informed him that Kemper did not want certain of the stations on the ABC lineup of stations carrying Evening

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[2] The 32 unwanted stations which Kemper sought to delete from the ABC lineup included 31 stations which had been deleted from prior Kemper orders of NBC lineups on the basis of Kemper's analysis, described above, of tv markets throughout the U.S. The one additional station, Yakima, was included in Kemper's orders to NBC because the NBC Yakima affiliate had a 40% plus coverage but was deleted from Kemper's order to ABC because the ABC Yakima affiliate had less than a 40% coverage (55a, 56a-57a, 82a-83a, 84a-86a).

Report (Pl. Supp. Ex. 24(f), Testimony of Nordmark, ABC's Salesman, p. 70).

Kemper's repeated requests for a selected lineup were rejected by ABC, and in this respect the courts below made the following findings:

1. ABC had an offering sheet for the program to which it attached its cleared lineup of 100 stations as of October 1, 1961 (B5).

2. "[I]t seems clear that ABC's offer was of the 'then-going lineup'—*i.e.*, the stations carrying the program at the time of any particular broadcast • • • " (B53).

3. After Mr. Beebe of ABC received Kemper's May 4, 1962 order for the limited lineup he told Kemper's advertising agency that the lineup ordered by Kemper "varied substantially from the then-going lineup" and:

> "Mr. Beebe told Mr. Gunn [of Kemper's advertising agency] that at the package price quoted he did not see how stations could be eliminated but if they were eliminated 'it would cost' and that they 'would have to renegotiate it and individual markets would have to be contacted' " (B23).

The Court of Appeals found:

> "In response to the May 4 letter, Mr. Hede, a vice president and administrative sales manager for ABC in New York, informed Mr. Arne Nordmark, sales service manager for ABC in Chicago, that Kemper's truncated list of sixty-eight then-going stations could only be purchased at 'rate card.' 'Rate card' indicated a charge based primarily on ABC's schedule of pay-

ments to its local affiliates for their broadcasts of network programs sponsored by national advertisers. These rates would have represented approximately a ninety per cent increase over the price previously negotiated by ABC and Kemper and which was the basis for Kemper's May 4 letter" (C8).

The Court of Appeals characterized ABC's reaction to the May 4, 1963 order:

"ABC's initial response was indeed, as might well have been expected, decidedly adverse, * * *" (C8).

4. By letter dated May 10, 1962 ABC acknowledged receipt of Kemper's May 4 order, but specified contrary to the May 4 order, that the lineup would include the 32 stations which Kemper had deleted in its May 4 order letter (B24, B25).

5. Around May 14, 1962 an ABC sales representative, Mr. Nordmark, was informed by a senior ABC official that ABC would not sell the selected portion of the lineup at the package price (B26).

6. On May 18, 1962 the same ABC salesman told Kemper's representative that if there were certain markets that Kemper did not want ABC would black out the Kemper commercials, but that the charge for this would be costly, "exorbitant, in fact" (B27).

7. On May 21 or May 22 the ABC salesman, after conferring with ABC officials in New York, reported to Kemper's representatives that "Kemper could not have the cancellation clause or specified ordered lineup (B28).

8. Two or three days later ABC's salesman told Kemper's representative that Kemper could have the ordered lineup at "rate card" (B28), a 90% increase over the price previously negotiated by ABC and Kemper (C8). This was after Kemper had decided on May 23 to buy the full lineup (88a-91a).

ABC had a policy throughout these negotiations that Kemper could not select part of the ABC lineup and still obtain the package price; that if Kemper insisted on selecting its lineup it would have to pay the full "rate card" price. Thus Mr. Hede, an ABC vice president, testified that as of approximately May 14, 1962:

> "I don't recall at that time, but going back to their May 4 letter, we made clear that if they wanted their own it would be rate card" (106a).

Mr. Hede also testified that it was ABC's position all the way through these negotiations that in order to obtain the package price Kemper had to buy ABC's lineup (106a). The District Court found that after Mr. Hede received the May 4 letter Mr. Scherick, who was ABC's vice president in charge of television network sales (B4), told Mr. Hede that "if Kemper wants to select its own stations they will have to go 'rate card,' which Mr. Hede passed on to Mr. Nordmark" (B56).

The District Court held that the issue propounded by the Circuit Court in its final opinion of December 15, 1967 "may never actually have been an issue in the case, the real issue being *why* did Kemper not negotiate further regarding the 'unwanted' stations" (B47). The Court's conclusion was that elimination of the unwanted stations was not of primary concern to Kemper and that Kemper agreed

to take the unwanted stations in order to get the large package discounts and certain additional stations for an additional discounted price of $3,000 per broadcast. Thus the District Court stated:

> "Although much emphasis has been focused by Kemper at trial on the 'unwanted' stations, the fact is that Kemper's primary concern was with the stations that ABC had not yet cleared—the Kemper 'key markets'—and Kemper was now [May 18, 1962] prepared to take the stations in the then going lineup in the form of a specific ordered station lineup if they could also get the additional key markets they wanted at substantially the same discount and could also have a cancellation clause" (B58).

The District Court further found that for Kemper "the principal consideration was cost" (B67), that Kemper may have received compensating concessions from ABC for agreeing to take the unwanted stations (B66), and that "Kemper got substantially what it bargained for" (B73). The Court also stated that it was "difficult to conclude that Kemper acted unreasonably in not negotiating further with respect to the lineup" (B73), but that if Kemper was being coerced to take stations it did not want then "its failure to negotiate further was unreasonable" (B76). The Court similarly found that "Kemper (assuming for the purpose of the trial of this issue that the specific lineup was an important consideration to plaintiffs) acted unreasonably in failing to negotiate further with ABC in this regard after May 18, 1962" (B4).

The Court of Appeals was also of the view that the unwanted stations were "not an important factor" (C6),

that "almost any blackout charge for eliminating the unwanted stations would probably have been too expensive for Kemper" (C9) and that:

> "Judge Tenney was entirely justified in finding that ABC did not coerce Kemper to break off talks about its ideal lineup because 'after the "feeler" of May 4, the "unwanted" stations were never a matter of concern to Kemper. . . .'" (C10).

The Court of Appeals thus concluded:

> "In this case, ABC's initial amorphous negative response to Kemper's May 4 letter undoubtedly exercised at least a marginal influence on Kemper's decision to pursue that tack no further. But Kemper was uninterested in paying *any* significant additional fee for blacking out unwanted stations and for this reason among others it never sought or received a reasonably firm ABC offer for the Kemper lineup. * * * ABC's preliminary bargaining position may have influenced Kemper, but Kemper did not persevere long enough with its ideal lineup to feel any economic pressure from ABC, and we cannot know whether ABC would ever have tried to bring any such pressure to bear" (C12, C13).

The Court of Appeals thus held that illegal tying or conditioning was not established by Kemper's repeated demands from April 17 to May 18 to delete certain of the stations from the ABC Evening Report lineup coupled with (1) ABC's failure to make the desired stations available at a price equivalent to their price as part of the package (absent differentials justified by cost) and (2) ABC's refusal

to sell the desired portion of the lineup except at a price substantially more ("exorbitant") than the price for the package. In short, for a seller without cost justification to require a buyer to pay more for part of the package than for the whole is not economic inducement or conditioning sufficient to establish a tie-in in violation of Section 1 of the Sherman Act. According to the Court of Appeals, the buyer must prove, in addition to this, that he persevered sufficiently to impose on the seller an obligation to quote a price on the selected lineup. The imposition of this additional requirement of sufficient perseverance on the part of the buyer introduces into antitrust tying doctrine an issue of fact, which will, if allowed to stand, greatly complicate and impair the efficient administration of antitrust tie-in cases and materially undermine the effectiveness of the doctrine that tie-ins are, given a sufficiency of economic power and volume of commerce, per se violations of the antitrust laws.

REASONS FOR GRANTING THE WRIT

The decision below will, if allowed to stand, undermine the effective implementation of the per se Sherman Act prohibitions against tie-in sales and is in conflict with prior decisions of this Court.

There are strong policy reasons why the more serious antitrust violations, that is the per se category, such as tie-ins, should be determined by objective and not subjective factors. *Northern Pacific* v. *United States,* 356 U.S. 1, 5 (1958). In *Albrecht* v. *Herald,* 390 U.S. 145 (1968), *United States* v. *Arnold Schwinn,* 388 U.S. 365, 372 (1967), *United States* v. *Parke, Davis & Co.,* 362 U.S. 29 (1960), this Court has made clear that what constitutes a combination within the meaning of the Sherman Act is so much a matter of law, rather than fact, that the Court will reverse not only a District Court, but also a jury finding as to the existence of a combination once certain facts are shown. The rationale of these decisions is that effective implementation of antitrust policy requires that certain courses of conduct be condemned universally rather than only when a particular District Court or jury wishes to condemn the course of conduct; in short, this Court has insisted on determining basic issues of economic policy itself rather than allowing those decisions to be delegated to trial courts or juries as matters of pure fact.

This Court has repeatedly reaffirmed its holding in *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 305-306 (1949) that "tying agreements serve hardly any purpose beyond the suppression of competition." (*Fortner Enterprises* v. *United States Steel,* 394 U.S. 495 (1969);

United States v. *Loew's, Inc.*, 371 U.S. 38 (1962); *Northern Pacific* v. *United States*, 356 U.S. 1 (1958). The importance of the *per se* rule of antitrust illegality in the tie-in area is highlighted by the trend of these decisions toward reducing to an absolute minimum the requirements for a showing that the seller had economic power in the market in which the tying product is sold. Thus, in *Northern Pacific* v. *United States*, 356 U.S. 1 (1958), the court held that the requirement of economic power could be satisfied by a showing of the volume and location of the land involved and the number of contracts involved; in *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962) the requirement was fully satisfied by the uniqueness of the films; and in *Fortner Enterprises* v. *United States Steel*, 394 U.S. 495 (1969), the court held it could be satisfied simply by showing that the tie-in was imposed.

The decisions below would validate tie-ins unless there is a showing that the buyer persevered to some undefined degree in demanding selectivity, even after the seller refused to break the package into its component parts. These decisions will greatly complicate and impede the effective enforcement of the absolute prohibition against tie-ins by introducing into each case a new factual issue: did the buyer persevere sufficiently to impose a duty on the seller to make the products available separately? The court below made no attempt to formalize a standard to measure what would constitute "sufficient" perseverance. Indeed, we submit it would be difficult as a practical matter to do this. The result will be to blur the up to now clear and concise measure of illegal tie-ins. Sellers will be encouraged to evade the per se rule of tie-in invalidity by concealing the tying practices in the intricacies of their negotiations

with buyers or under the guise of "salesmanship" or a "statement of bargaining terms." The decisions below will encourage sellers to say to customers "I want you to buy the package" and "If you want to buy only a part you will have to talk to Mr. X at our New York office," or "You *may* have to pay an exorbitant amount for the right to select," or even "I reject your firm offer for the part, but you are welcome to renegotiate with Mr. X in New York," and then delay in producing a price for the selected part until the buyer capitulates.

Even if the buyer has some reason not to buy the tied product, such as a preference for a competing product, he will soon tire of such games and agree to take the entire package. In many cases, of course, the buyer is indifferent whether he buys the tied product from the tying seller, and as Mr. Justice White noted in *Fortner* "The tie may do the tier little good unless the buyer is in that position." *Fortner Enterprises* v. *United States Steel,* 394 U.S. 495, 512-513, n. 3 (1969) (dissenting opinion).

In *United States* v. *Loew's, Inc.,* 371 U.S. 38, 53, 55 (1962) this Court underlined the importance it attaches to the effective enforcement of prohibitions against tie-ins by approving a lower court decree prohibiting a seller from delaying at all in producing individual prices on request and modifying the decree to prohibit all temporary refusals to deal in broken lots except that the seller might briefly defer dealing in broken lots pending the expeditious conclusion of *bona fide* negotiations for sale of the complete package to another customer. The Court thus enjoined all but specified temporary refusals since otherwise the refusal may "tend to force some stations into buying pre-set packages" (371 U.S. at 55). The Court should now make clear that

this prohibition on refusals to offer to sell part of the package at individual prices proportionate to the package price is a substantive requirement of Section 1 of the Sherman Act, and not merely a remedial device.

Here the Circuit and District Courts focused on such subjective factors as Kemper's motives, the degree of Kemper's desire not to buy the unwanted stations, Kemper's "real objectives," its diligence in persevering and the reasonableness of its failure to persevere after May 23, 1962. This perfectly illustrates the uncertainties and complexities that would attend the individual juries and the District Court judges assigned to try such cases if they are allowed to sustain tie-ins whenever they are not persuaded that the buyer persevered long enough to make the buyer's acceptance of the tie-in "unreasonable." Such an inquiry would emasculate the *per se* rule and the policies underlying that rule.

Finally, it is clear beyond question that the decision below is squarely contrary to the many decisions of this Court that have found that economic pressure is not necessary to proof of an illegal tie-in. This Court has repeatedly found tie-in sales to be unlawful under circumstances where it is a matter of almost complete indifference to the buyer whether he buys the tied products from the defendant seller. All that need be shown is that the buyer did in fact buy one product as it agreed to do, in order to get the desired product. In both *Northern Pacific Ry.* v. *United States,* 356 U.S. 1 (1958) and *International Salt Co.* v. *United States,* 332 U.S. 392 (1947) the court found tying agreements to be unlawful even though they did not require the buyer to purchase the tied product from the defendant if he could buy it on more favorable terms elsewhere or if he chose not to buy the product at all.

In *Fortner Enterprises* v. *U. S. Steel,* 394 U.S. 495 (1969) the court held that no showing that the purchaser was subjected to economic pressure was necessary to establish a tie-in. The purchaser's president acknowledged that he accepted the tying condition because the financing terms (the tying product) were unusually and uniquely advantageous to him (394 U.S. at 504). Although four justices dissented, being of the view that no market power over the tying product was shown, they suggested no requirement for the type of economic pressure required by the courts below. To the contrary, Mr. Justice White, in his dissenting opinion, stated:

> "And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first,[3] such tying agreements may work significant restraints on competition in the tied products."

"[3] Theoretically, the tie may do the tier little good unless the buyer is in that position * * *." (394 U.S. at 512-513)

The inducement to the buyers in both *United States* v. *Paramount Pictures,* 334 U.S. 131 (1948) and *United States* v. *Loew's, Inc.,* 371 U.S. 38 (1962) was less than the inducement ABC offered to Kemper to take the complete package. Kemper was admittedly given to understand that it would have to pay at least some amount above the entire package price in order to eliminate the unwanted stations from the lineup. The only question was how much an "exorbitant" premium would come to. So far as the judicial opinions show, neither the exhibitors in *United States* v. *Paramount Pictures,* 334 U.S. 131 (1948) nor

the television stations in *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962) were ever subjected to any requirement, express or implied, to exhibit or broadcast the unwanted films. The effect of block booking in both cases was simply that the exhibitors or stations would have to buy the entire package of film licenses, regardless of which, or how many, films they intended to exhibit or telecast. Thus, for all practical purposes, the exhibitors and stations could, even under the block booking practice found unlawful in *United States* v. *Paramount Pictures,* 334 U.S. 131 (1948) and *United States* v. *Loew's, Inc.,* 371 U.S. 38 (1962), take the selected part as long as they paid the full package price. This clearly was an option not made available to Kemper, since Kemper was given reason to believe it would have to pay at least some premium in order to black out its commercial message over the unwanted stations.

This is precisely what, consistently with *Loew's,* the Fourth Circuit held illegal in *Advance Business Systems & Supply Co.* v. *SCM Corp.,* 415 F.2d 55, 62 (4th Cir. 1969). There it was held that SCM had unlawfully tied its paper and supplies to the rental of its copying machines, even though it offered to sell its machines without any tying provision. The court stated:

> "Tie-ins are non coercive, and therefore legal, *only if the components are separately available to the customer on a basis as favorable as the tie-in arrangement*" (emphasis added).

The decision below has upheld a tie-in even though the desired stations were never made available to Kemper at the same discount as was used to reach the package price; indeed the only price at which they were made available

was more than the total package price for the entire lineup, including the unwanted stations. The Court of Appeals for the Third Circuit has held this is coercive as a matter of law, *American Securit* v. *Shatterproof Glass*, 268 F.2d 769 (C.A. 1959).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinions of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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November 5, 1971

APPENDICES

APPENDIX A

Opinion of Court of Appeals Dated December 15, 1967 Reversing Summary Judgment and Remanding for Trial on Issue of Coercion (388 F.2d 272)

(Entered December 15, 1967)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 133, Docket 31528

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, FEDERAL MUTUAL INSURANCE COMPANY and LUMBERMENS MUTUAL CASUALTY COMPANY,

Plaintiffs-Appellants,

v.

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Defendant-Appellee.

Before FRIENDLY, KAUFMAN and ANDERSON, Circuit Judges.

KAUFMAN, Circuit Judge:

Several insurance companies generally known as the Kemper Insurance Companies group [Kemper], the appellants here, instituted this action on May 23, 1963 against American Broadcasting-Paramount Theatres, Inc. [ABC] seeking a declaratory judgment that a television sponsor-

ing agreement between Kemper and ABC constituted a tie-in which violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The complaint, *inter alia*, sought treble damages in addition to a decree that the agreement was illegal and unenforceable. On May 31, 1967—almost 2 years after the parties had moved for summary judgment—the District Court granted ABC's motion and denied Kemper's. This appeal followed from the judgment against Kemper. We believe that summary judgment, as intended to be utilized pursuant to Rule 56 of the Federal Rules of Civil Procedure, was inappropriately and imprudently employed in this case to resolve the important and exceedingly complex factual and legal dispute presented to the trial judge. We are of the view that the antitrust questions cannot be resolved for there remain material issues of fact that are not brought into sharp focus or clarified by the record before us. We therefore reverse and remand for further proceedings consistent with this opinion.

I.

A substantial portion of the District Court's careful and elaborate opinion (reported at 270 F.Supp. 619) is devoted to a detailed presentation of the factual background of the dispute. While we shall make an effort to avoid repetition, the complexities of the litigation will be sketched in order to clarify the reasons for our belief that summary judgment was inappropriate in this case.

ABC is one of 3 major television networks in the United States and during 1962-1963 approximately 260 television stations were affiliated with that network.[1] The greater

[1] For interesting discussions of the structure of the television industry and television advertising rate practices see Blake & Blum, Network Television Rate Practices: A Case Study in the

part of network income is derived from selling programs to sponsors (advertisers). All the networks arrange financial terms and details with their advertisers, such as providing network programs, technical facilities and scheduling programs for clearance. The programs and "commercials" are ultimately broadcast to the public over the facilities of local stations which are licensed by the Federal Communications Commission [F.C.C.].[2] The networks and local stations share the sponsor's payments on a percentage basis under the terms of an affiliation agreement.

In April 1961, ABC announced it would produce a nightly news program—the "Evening Report"—which it offered to its network stations on a 5-nights-per-week basis and by August, 95 stations had "cleared" (accepted) the program. These cleared stations are known in industry parlance as the "going lineup."

Under the typical affiliation agreement then employed by ABC, when a station cleared a program it was compelled to accept the sponsor provided by the network as well as those portions of the program for which the network could not find a sponsor. The local station did not receive any payment from ABC for broadcasting the unsponsored parts, but the apparent harshness of this arrangement was mitigated by the network's practice of "releasing" the un-

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Failure of Social Control of Price Discrimination, 74 Yale L.J. 1339 (1965) [Blake & Blum]; Note, Antitrust Implications of Network Television Quantity Advertising Discounts, 65 Colum.L.Rev. 1213 (1965) [Columbia Note].

[2] Each of the networks, however, is owner and licensee of 5 local stations—the maximum permitted by FCC regulations. See Amendment of Multiple Ownership Rules, 18 Fed.Reg. 7796, 9 P. & F. R. R. 1563 (FCC 1953).

Where the program is not a network program, the station is free to sell the broadcast time on that program directly to advertisers.

sold time to its affiliates for direct sale by them.[3] Another facet of these complex arrangements was that the local stations were required to "option" certain time periods and to accept programs (and sponsors) provided by ABC for those hours. "Evening Report," however, was not broadcast during an option period and the local stations were therefore free to accept or reject the program as they saw fit.

From time to time, it was the practice of ABC to issue "offering sheets" concerning "Evening Report." In essence, these are notices advising potential advertisers of the number of clearing stations, the prospective cost of the program, the names of other advertisers, if any, already sponsoring the program, and other relevant details. The gross price mentioned in the offering sheets was in large measure dependent on the hourly station rates of the individual local stations which had cleared the program. ABC published these rates in a so-called "rate card" which was designed to reflect such factors as the number of homes with television sets reached by the particular station, the quality of its signal and the number of competing stations. In addition to the rate card time charge, the gross price contained in the offering sheet included a program charge and a "networking" charge. The offering sheet of April 27, 1961 is

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[3] Such sales are known as sales on the "local market." The time released for local sales was, however, subject to recapture on 3 weeks' notice. In this connection, it should be noted that ABC had two types of affiliation agreements—"primary" and "secondary"—which contained different terms. The vast majority of clearing stations were primary affiliates and the description in the text is of their relation with ABC. (For example, of the 95 stations that had cleared "Evening Report" in August 1961, approximately 90 per cent were primary affiliates which had their major network association with ABC.)

typical and its essential terms are set out in the margin.[4] We have been told that the offering sheet gross price was only a starting point for negotiations; a variety of "special discounts" were offered potential advertisers.[5] And, the ultimate price charged was the product of detailed negotiations between advertiser and networks.[6] In fact, Kemper alleges and ABC does not deny that "Evening Report" was not sold by ABC to a single sponsor at full rate card.

The Kemper-ABC contract, dated August 15, 1962 (and resulting from extended negotiations), provided *inter alia*, that Kemper would sponsor "Evening Report" one evening per week for 26 weeks over 130 local television stations. But Kemper insists that it did not want to advertise over 32 of these stations and that it had agreed to take them only because ABC refused to make available the 95 stations it did want—except at an unreasonable cost—unless Kemper agreed to take the entire lineup.[7] According to Kemper,

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[4] The program was offered for periods of 13 or 26 weeks for each week-day in one-quarter hour segments. The estimated lineup was 110 stations and the approximate gross was $34,500. This was based on rate card time charges for the clearing stations to which was added a program charge of $5,000, a 15 per cent commission of $750, and a networking charge of $500. A "Special Discount" of 35 per cent off rate card was offered for the purchase of 2 quarter-hour segments over 26 weeks (or $28,675, including all charges) and a 30 per cent discount (or $30,400 *in toto*) was offered if 1 quarter-hour was taken.

[5] For a detailed description of ABC's pricing practices see Blake & Blum, supra, 1351-53.

[6] Id. at 1347. The legality of these practices under the principles of the Robinson-Patman Act, 15 U.S.C. § 13, has received much attention but is not now before us. See generally articles cited in note 1.

[7] In the record, the precise number of unwanted stations is sometimes said to be 32 and at other times 35. Apparently 3 unwanted stations were added to the lineup after Kemper accepted ABC's terms.

a detailed analysis convinced it that it did not do a sufficient amount of business in the markets served by the 32 stations to justify advertising over them. Moreover, it claims that it did not seek business from these areas because it could not adequately service customers located there. ABC admits that Kemper sought to eliminate the 32 stations but contends that the lineup question was of minor importance in Kemper's advertising policies. It also states that Kemper ultimately took the entire package offered by ABC because it best served Kemper's needs. On its surface, it would appear that the contract does not reflect an illegal tie-in; it merely recites an agreement to sponsor a program over 130 different stations. But, we are urged not to overlook that ABC's alleged coercion is said to have taken place during the extensive period of negotiations which culminated in the contract.

Since the history of the negotiations is fully set forth in Judge Tenney's opinion, we will repeat only so much of it as will aid in comprehending our ultimate conclusion. It is not disputed that at a meeting in ABC's New York offices on January 25, 1962, Edgar Sherick, then ABC's vice president in charge of network sales, offered Buckingham W. Gunn, a senior official of Kemper's advertising agency, Clinton E. Frank, Inc. [Frank], the right to sponsor "Evening Report" at a package price of $22,000 per one quarter-hour segment for 2 segments per week over a 26 week period. The talks were preliminary, and detailed negotiations continued between officials of Kemper and the Frank agency and members of ABC's Chicago office. These talks culminated in a meeting that was held in the Chicago offices of the Frank agency on April 27, 1962—by which time the going lineup consisted of approximately 99 stations. The subject matter under considerable discussion was that Kem-

per would order 39 segments of "Evening Report" over a 26 week period but would have the right to reduce its order to one segment per week if within 30 days of signing the contract not all the stations in Kemper's key markets cleared the program. The price was to be $22,000 per segment for 39 segments and $24,000 if only 26 segments were ordered. In addition, Kemper expressed an interest in 28 stations which had not yet cleared the program. ABC was willing to agree to furnish 15 of these stations at a maximum charge of $3,000 (assuming all cleared) and the remaining 13 at "no charge."

On or about May 4, 1962 Kemper submitted its first "order letter" for "Evening Report" in which it asked for 39 segments over a 26 week period. The lineup requested consisted of 95 stations—67 of the 99 already cleared as well as the 28 requested at the April 27th meeting. For this package Kemper offered a total price of $24,250 which its order letter broke down into a time charge which was not to exceed $18,750, a program charge of $5,000 and a $500 networking charge. The time charges were to be reduced by the "package rate" of any of the ordered stations that did not clear the program. Kemper conditioned its order on all the stations in its 41 "key markets" clearing.

According to ABC, Kemper's May 4th order improperly substituted the 28 stations it had requested at the April 27th meeting for 32 of the stations that were part of the going lineup which ABC had offered. And, Kemper attempted to get these stations at the package rates discussed at the April 27th meeting even though the time charges for the 28 stations totaled more than twice those for the 32 stations. Accordingly, ABC rejected Kemper's order and on May 10, 1967 counter-offered Kemper the full 99 station lineup

(which included the 67 stations ordered on May 4th) at a time charge of $15,750 and the 28 stations at a total cost of $3,000. With the program and network charges included, the cost was $24,250—the same as in Kemper's May 4th order. Although it was thus offered extra stations at no extra cost, Kemper maintains that it wanted and preferred the package as it ordered it on May 4th. It alleges that ABC consistently refused to sell it the lineup it sought except at full rate card—that is, without the 47½ per cent discount reflected in the April 27th discussions. ABC admits that it refused to sell Kemper its limited lineup at the April 27th package rate although Kemper was asking for fewer stations at the same price; but, it responds (and Kemper denies) that it would be expensive to black out Kemper's commercials on the unwanted stations. Also, ABC tells us that it never insisted on Kemper paying full rate card for the smaller lineup but rather offered to negotiate further. In any event, Kemper ultimately accepted the entire lineup of 130 stations and a contract was signed.

II.

The life of the Kemper-ABC agreement (dated August 15, 1962) proved to be less than the period consumed by the negotiations already discussed. After only 4 of the 26 ordered broadcasts, Kemper notified ABC that it considered its obligations under the contract at an end. It declared that on November 11, 1962, ABC had broadcast a program titled "The Political Obituary of Richard M. Nixon" during which Alger Hiss was permitted to evaluate Mr. Nixon's role in the Hiss perjury case. The program was promoted on broadcast time sponsored and paid for by Kemper and in substance it contended that ABC violated the contract

by associating Kemper with a program that was in poor taste. Two days later Kemper advised ABC that it was cancelling its sponsorship. Efforts at reconciliation proved fruitless and on January 9, 1963 ABC filed suit in the New York Supreme Court for breach of contract. A final judgment was ultimately entered for $265,047.21. 48 Misc.2d 397, 265 N.Y.S.2d 76, aff'd, 24 App.Div.2d 851, 265 N.Y.S.2d 577 (1st Dept. 1965), aff'd, 17 N.Y.2d 849, 271 N.Y.S.2d 284, 218 N.E.2d 324 (1966). Kemper asserted for the first time its claim that the agreement with ABC violated the Sherman Act in its answer in the state court suit and in the complaint it filed in federal court.[8]

On May 31, 1963, ABC moved in the federal court to dismiss Kemper's complaint on the ground that it failed to state a claim upon which relief could be granted. Judge Cooper denied this motion, 221 F.Supp. 848 (S.D.N.Y. 1963), noted, 39 Notre Dame Law. 719 (1964), holding that the allegation that ABC refused to make available a limited lineup of 95 stations except at a disproportionately high price stated a cause of action under the Sherman Act. The case was then assigned to Judge Tenney as a Rule 2 Judge (Rule 2, General Rules for the Southern and Eastern Districts of New York) and the motions for summary judgment were then argued to him. After examining voluminous affidavits, exhibits and depositions, he granted ABC's motion for summary judgment in a painstaking opinion

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[8] The state court chose not to adjudicate the validity of the contract under the antitrust laws although it indicated that on its face the contract was enforceable. 42 Misc.2d 939, 249 N.Y.S.2d 481 (1963), aff'd, 20 A.D.2d 890, 251 N.Y.S.2d 906 (1st Dept.1964), aff'd, 17 N.Y.2d 849, 218 N.E.2d 324, 271 N.Y.S.2d 284, cert. denied, 385 U.S. 931, 87 S.Ct. 291, 17 L.Ed.2d 213 (1966). ABC does not contend that the state court judgment bars Kemper from pressing the instant litigation.

which consumes almost 70 pages in the appendix on this appeal.

Judge Tenney advanced 4 grounds for his decision. First, he ruled that ABC sold Kemper a single "product" —the privilege of being identified as the sponsor of "Evening Report." Since only a single product had been sold, a tie-in could not have occurred. Second, assuming *arguendo* that the transaction was properly characterized as the sale of different television stations, for purposes of tie-in analysis the different stations were components of a single product because it was "a reasonable and economically justified requirement of the industry" to sell them all as one package. Third, assuming *arguendo* that more than one product was involved in the sale, ABC was legally justified in rejecting Kemper's May 4th order and reverting to its higher rate card prices "even though said prices are substantially higher than the average price per unit for all the components of the package." Finally, he ruled that Kemper was not coerced by ABC because it never attempted to negotiate a lower price after ABC rejected its May 4th order. Although we understand the reasons which would motivate a district judge in seeking to avoid a complex and grating trial, we believe that material questions of fact were presented with respect to each of these alternative grounds for decision and that summary judgment was improper.

III.

The importance of summary judgment in the structure of modern federal practice as a procedural weapon to pierce sham claims and resolve actions where the facts are undisputed has been frequently noted by this court. See,

e. g., Dressler v. MV Sandpiper, 331 F.2d 130 (2d Cir. 1964). Although some of the older decisions of this court had put in question the wisdom of granting summary judgment, we interpreted the 1963 amendments to Rule 56 as suggesting that the courts thereafter were to approach the Rule with less reticence and more resoluteness. Dressler v. MV Sandpiper, supra (discussing cases); 6 Moore's Federal Practice ¶ 56.15 [1], 1966 supp. at 102.

The functions and purposes of summary judgment have been stated thus:

> "It is intended to prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trials where no genuine issues of fact are raised. The procedure enables a party to pierce the allegations of fact in the pleadings and obtain relief by showing that there are no issues to be tried. Its purpose is to separate the formal from the substantial issues, eliminate improper issues, determine what, if any, issues of fact are present for the jury to determine, and enable the court to give judgment on the issues of law where no disputed issues of fact are found." 3 Barron & Holtzoff, Federal Practice and Procedure, § 1231, at 97-100 (Wright ed. 1958) (footnotes omitted).

But it is a fundamental maxim that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. And, "[o]n summary judgment the inferences to be drawn from the underlying facts contained in such materials [affidavits, exhibits and depositions] must be viewed in the light most favorable to the party opposing the motion." United

States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curiam).[9] Thus, the standard to be applied on a motion for summary judgment is analogous to that used on a motion for a directed verdict. Empire Electronics Co. v. United States, 311 F.2d 175, 180 (2d Cir. 1962). See 6 Moore, supra, ¶ 56.02 [10]; 3 Barron & Holtzoff, supra, § 1234, at 133. Of course, the law provides no magical talisman or compass that will serve as an unerring guide to determine when a material issue of fact is presented. As is so often true in the law, this is a matter of informed and properly reasoned judgment.

The instant litigation is somewhat atypical because both parties clamor for summary judgment urging that the record presents no disputed material issue of fact—as if a trial is to be avoided like the plague. But, rather typical of such "agreements" to end the case by summary judgment, this admirable harmony does not carry over to agreement on what the "undisputed" facts are on the permissible inferences to be drawn from them. While a substantial part (but not all) of the evidence is documentary, the parties sharply dispute the inferences to be drawn, see United States v. Diebold, Empire Electronics v. United States, supra, and, as we shall see below, the depositions present conflicting testimony. In any event, "[t]he well settled rule is that cross-motions for summary judgment

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[9] In light of the history of the Kemper-ABC agreement one may suspect that the claim of Sherman Act illegality was an afterthought to justify having broken a contract that had turned sour. And, it is understandable that the District Court looked with a jaundiced eye on Kemper's allegations that it was coerced into accepting all 130 stations. But, "[t]hat it might be surmised that the adverse party is unlikely to prevail at the trial is not sufficient to authorize summary judgment against him." 3 Barron & Holtzoff, supra, § 1234, at 132.

do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed." 6 Moore, supra, ¶ 56.13, at 2247. See also Barron & Holtzoff, supra, § 1239, at 176. Nor, have we lost sight of the fact that neither ABC nor Kemper requested a jury trial and that ultimately the unresolved questions will be decided by the District Judge. But the function of an appellate court is not to determine whether there is sufficient evidence in the record to substantiate "findings" of fact that were never made. Compare Bollenbach v. United States, 326 U.S. 607, 614, 66 S.Ct. 402, 90 L.Ed. 350 (1946). On the contrary, the District Court must at a trial resolve contested factual issues and draw the appropriate inferences in the first instance with full recognition that the issues are disputed, and only after sufficient evidence has been introduced to permit an informed judgment. As we said in Empire Electronics Co. v. United States, supra, 311 F.2d at 180–181: "If reasonable inferences could be drawn • • • such that the issue would be submitted to the trier of fact, then Rule 56(c) leaves us no latitude and *we must return that issue to the trier of fact in this case the judge.*" (Emphasis supplied.) See 6 Moore, supra, ¶ 56.15 [1–02], at 2291–92; Asbill & Snell, "Summary Judgment Under the Federal Rules—When an Issue of Fact Is Presented," 51 Mich.L.Rev. 1143, 1146 n. 15 (1953). Cf. Colby v. Klune, 178 F.2d 872, 874 (2d Cir. 1949).

Moreover, we have been forewarned that the use of summary judgment in complex antitrust litigation must be closely scrutinized. Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). And, this admonition is apt where too little is known of the

practical impact of the challenged transactions, White Motor Co. v. United States, 372 U.S. 253, 263–264, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963). But, this is not to say that summary judgment never has a place in the antitrust field. See White Motor Co. v. United States, supra, 372 U.S. at 259, 83 S.Ct. 696; 6 Moore, supra, ¶ 56.17 [5]; 3 Barron & Holtzoff, supra, § 1232 (1967 supp.).

The question before us is not the availability of the rule in any specific category of cases, but whether the record in this particular case adequately clarifies the complex and convoluted issues that are so common in antitrust litigation. Thus, our holding here does not weaken the force of Rule 56, but "simply recognize[s] that there are instances where summary judgment is too blunt a weapon with which to win the day, particularly where so many complicated issues of fact must be resolved in order to deal adequately with difficult questions of law which remain in the case." Miller v. General Outdoor Advertising Co., 337 F.2d 944, 948 (2d Cir. 1964). Cf. Allied Mutual Insurance Co. v. Lysne, 324 F.2d 290 (8th Cir. 1963); S. J. Groves & Sons Co. v. Ohio Turnpike Commission, 315 F.2d 235 (6th Cir. 1963). In the context of this case, Judge Weinfeld stated the precept well:

> "I am persuaded that a decision after trial will be the more desirable procedure in the matter. It will serve to bring into sharper focus certain issues of importance which have been obscured by the voluminous affidavits with their statements, counterstatements and alternative positions, and the conflicting conclusions which the parties contend are to be drawn from the multitude of facts and statistics presented.

> Under all the circumstances the application of the summary judgment rule is questionable and the Court deems it sound judicial administration to permit a trial for such additional evidence and clarification as may be relevant." United States v. Bethlehem Steel Corp., 157 F.Supp. 877, 879 (S.D.N.Y. 1958) (Bethlehem was ultimately tried to the court, 168 F.Supp. 576).

See also Kennedy v. Silas Mason Co., 334 U.S. 249, 256-257, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948); H. J. Heinz Co. v. Beech-Nut Life Savers, Inc., 181 F.Supp. 452 (S.D.N.Y. 1960).

IV.

With these principles in mind, we turn to the grounds for decision advanced by the District Court. Judge Tenney reasoned that ABC had not tied the sale of the 95 stations Kemper wanted to the sale of 32 stations it did not want because, conceptually, only a single "product" was involved in the transaction. Indeed, it is axiomatic that a tie-in analysis begins with the question of separability—the requirement that the tying and tied products be different, or, stated simply, that the forced purchase be of a second distinct commodity. As Professor Turner (now Assistant Attorney General in charge of the Anti-Trust Division) stated:

> "The requirement that they [the tying and tied products] be 'different' obviously cannot be dropped out. Every manufactured item is a combination of various materials and components. There are obvious cases in which we would say either that there is no tie-in because the object of the sale is a single product, or

that if there is a tie-in, it should not be deemed illegal per se or even illegal at all." Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv.L.Rev. 50, 67–68 (1958).

See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614, 73 S.Ct. 872, 97 L.Ed. 1277 (1953); Susser v. Carvel Corp., 332 F.2d 505, 512 (2d Cir. 1964), cert. dismissed, 381 U.S. 125, 85 S.Ct. 1364, 14 L.Ed.2d 284 (1965); Pearson, Tying Arrangements and Anti-trust Policy, 60 Nw.U.L.Rev. 626, 627 (1965).

Times-Picayune, supra, has been cited to us as a case where the Court was presented with a question for determination not too dissimilar from the one before us. The government contended that the defendant had unlawfully tied the sale of advertisements in its morning newspaper to the sale of advertisements in an afternoon paper it also published. The Court stated that:

"two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant 'tying' product exists (in fact, since space in neither the Times-Picayune nor the States [the two papers] can be bought alone, one may be viewed as 'tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same." 345 U.S. at 614, 73 S.Ct. at 883.

But the issue of separability here is not quite the same as in *Times-Picayune;* it is manifest that whether one or more products is involved in a given transaction must be dependent upon the nature of that transaction. One factor that may distinguish this case from *Times-Picayune*, for

example, is that commercials over different local television stations reach what are clearly different markets."[10] Moreover, as Judge Tenney recognized, the influence of the Court's analysis of the tying issue in *Times-Picayune* has been relatively restricted in later cases. See, e. g., Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 760-761 (6th Cir.), cert. denied, 382 U.S. 820, 86 S.Ct. 47, 15 L.Ed.2d 66 (1965).

The District Judge, in determining that a single product was involved in the Kemper-ABC transaction, placed major reliance on Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc., 295 F.2d 375 (7th Cir. 1961), cert. denied, 369 U.S. 812, 82 S.Ct. 689, 7 L.Ed.2d 612 (1962).[11] In *Amana*, CBS sued to recover monies due under a television sponsorship agreement and Amana counterclaimed that CBS's rate structure violated sections of the Clayton Act, 15 U.S.C. §§ 13(a), 14 and 15. The court held that "a purchase by Amana of the privilege of having itself identified as sponsor of the program broadcast and making use of the permissible portion thereof for advertising its products" was not the purchase of a "commodity" within the

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[10] Compare Blake & Blum, supra, at 1385-86: "Characterizing the network's discount practices as tying arrangements does not present the difficulties encountered by the Court in *Times-Picayune*. Even assuming the Court there had sound bases for treating readership of the morning and evening papers as homogeneous, which seems doubtful, network tie-ins are of much more distinct products. Evening and afternoon viewers of television, for example, constitute a substantially different market, as do viewers in New York and Dubuque. Furthermore, the morning and evening papers effected critical economies by leaving ad materials intact in page layouts from morning to evening editions. Network time tie-ins have no comparable claim to achieving economic efficiency."

[11] *Amana* has not received a welcome reception from the commentators. See, e.g., Blake & Blum, supra at 1379-80; Columbia Note, supra at 1232-34.

meaning of the Act. Id. at 378.[12] Whether or not *Amana* correctly characterizes the nature of the sale in this case, a point we do not decide, we see nothing in the rationale of that opinion which compels a holding that in analyzing the tying issue "the privilege of having itself identified as sponsor of the program" should not or may not be considered a different "product" for each station sold. We have already noted that each local station is licensed independently by the F.C.C. and serves different markets. To absolutely preclude applicability of the Sherman Act—a broad remedial statute—merely by characterizing a transaction by some *ipse dixit* formulation would be to frustrate the Congressional intent in a most mechanical fashion. In any event, this is merely to recognize the problem, not to solve it; there may yet be ample justification for treating a sale of advertising time over different stations as a single "product" for purposes of the antitrust laws. Compare Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 655 (1st Cir.), cert. denied, 368 U.S. 931, 82 S.Ct. 368, 7 L.Ed.2d 194 (1961).

Recognizing these considerations, Judge Tenney held that it "is a reasonable and economically justified requirement of the industry" to sell many-station lineups as a single package.[13] The trial judge applied the four criteria

[12] The Sherman Act, of course, is not limited to "commodities."

[13] A number of commentators have argued that the sales of commercial time over different television stations constitute different products for purpose of tie-in analysis. See, e.g., Schwartz, Antitrust and the FCC: The Problem of Network Dominance, 107 U.Pa.L.Rev. 753, 779-80 (1959). ABC seeks to explain away such authorities by pointing out that they deal with "must buy" practices by the networks and it asserts it does not have a "must buy policy." That may well be true but it misses the point. An analysis that "must buy" constitutes an illegal tie-in necessarily presupposes that the sale of time over different stations constitutes more than one product.

of separability laid down in United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 559 (E.D.Pa. 1960), aff'd per curiam, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961), and for present purposes we accept his summary of *Jerrold*. The first test is: "Did competitors of the seller offer all the components of the alleged 'product' separately and not exclusively as a single package?" Kemper alleges, and ABC does not deny, that when it advertised over the NBC network it was allowed to select its own lineup. And, there is some indication in the record that this practice was not uncommon in the industry. The second test is: "Was the number of components of the product variable 'so that hardly any two versions of the alleged product were the same?'" It is not disputed that ABC *offered* a going lineup to all prospective purchasers. But an uncontroverted affidavit submitted by Kemper alleges that on a number of occasions ABC sold "Evening Report" on a selective partial lineup basis.[14] Moreover, ABC admits that it was willing to sell Kemper the lineup it desired; ABC merely demanded that Kemper pay more. Third, "Was the purchaser charged for each component and not a lump sum for the total product?" It is undisputed that ABC's offering sheets set a total price per broadcast but it is also true that ABC published a rate card time charge for each individual station. Finally, "Did the seller offer similar components for sale separately?" As noted above, there was evidence suggesting that ABC did this on occasion.

Thus, applying the criteria suggested by *Jerrold* to the case before us, and drawing all inferences in favor of

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[14] For example, Kemper claims that in May 1963 General Mills purchased 69 stations from a master lineup of 106 stations; that in February 1964 Armour & Co. bought 37 stations out of a lineup of 109 and Sun Oil bought 44 of 104 stations.

Kemper as we are required to do, United States v. Diebold, supra, we are unable to determine on the record before us whether the Kemper-ABC transaction concerned a single product for purposes of a tie-in analysis.[15] The evidence submitted on this motion for summary judgment was simply insufficient to make a determination that the practices just described were typical or economically necessary in the television industry. ABC urges that it is in the public interest for it to build a "strong network." But it is not at all clear from the facts what added burden would have been imposed upon ABC had Kemper sponsored the program over only some of the stations which had cleared it for broadcast.[16] For example, would the network or local stations have incurred substantial costs by blacking out the undesired stations? Was there a ready national market where ABC could have sold the remaining stations? Would local stations refuse to clear the program if they knew that they might not be sponsored by particular advertisers? On the record presented, we find it impossible to answer these and similar relevant questions. In order that our decision not be misconstrued, it should be emphasized that we do not now hold that more than one "product" is involved in the sale of commercial time over many stations;

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[15] We note in this connection that the actual holding of *Jerrold* was that the defendant was justified in treating the "components" it sold as one "product" only for a short period following its introduction as a new "product," 187 F.Supp. 559-561. And, we have stated that "tying arrangements have been given short shrift under the antitrust laws." Susser v. Carvel Corp., supra, 332 F.2d at 512.

[16] Neither party has cited, and we have not found, any recent study of the FCC dealing with these problems. And generally, the FCC appears not to have been overly concerned with antitrust considerations. See Schwartz, Antitrust and the FCC: The Problem of Network Dominance, supra note 13, 781-86.

we merely hold that additional evidence and clarification is required.[17]

V.

Finally, the District Court decided that Kemper failed to demonstrate that ABC had employed an illegal tie-in (assuming, *arguendo,* that more than one "product" was involved) because "the necessary element of coercion, economic or otherwise, has not been proven." See Osborn v. Sinclair Refining Co., 286 F.2d 832, 836 (4th Cir. 1960), cert. denied, 366 U.S. 963, 81 S.Ct. 1924, 6 L.Ed.2d 1255 (1961). Two independent reasons were given: (a) ABC was legally justified in rejecting Kemper's May 4th letter order and reverting to its rate card time charges for Kemper's selected lineup; and (b) Kemper never attempted to negotiate a discount price after ABC rejected its May 4th order. This argument, we assume, is based on the premise that if Kemper never attempted to open the door, it cannot claim it was slammed in its face.

Here too, we find it impossible on the record before us to determine whether ABC was justified in reverting to its higher rate card prices. As we view the law, where there is no quality or distinguishing desideratum between a product offered singly or in a package, the seller cannot charge substantially higher for the individual product if the price differential has the effect of conditioning the sale of the single product to the sale of the entire package and if the difference in price cannot be legitimately justified by cost considerations.

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[17] Similarly, we voice no opinion on the rule of law that would apply if a sponsor demanded a lineup of two or three stations. See Pearson, Tying Arrangements and Antitrust Policy, supra at 628-29, commenting on Judge Cooper's opinion below. We will cross that bridge when we come to it.

The leading case in this area is United States v. Loew's Inc., 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962), in which the government challenged the "block booking" of feature motion picture films for sale to television exhibitors. The lower court decree had enjoined the defendants from:

> "(C) Entering into any agreement to sell or license the right to exhibit any feature film over any television station in which the differential between the price or fee for such feature film when sold or licensed alone and the price or fee for the same film when sold or licensed with one or more other film [*sic*] has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films." Id. at 43, 83 S.Ct. at 101.

The government contended that this provision was too vague for effective enforcement and the court responded:

> "The final judgments as entered only prohibit a price differential between a film offered individually and as part of a package which 'has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films.' • • • Differentials unjustified by cost savings may already be prohibited under the decree as it now appears. Nevertheless, the addition of a specific provision to prevent such differentials will prevent uncertainty in the operation of the decree • • • to ensure that all proper bases of quantity discount may be used, the modification [of the decree] should be worded in terms of allowing all legitimate cost justifications." Id. at 54-55, 83 S.Ct. at 107.

We do not read this to mean, of course, that a purchaser can select the most expensive individual item from a package and demand it at the average price for all the items in the package—a price which necessarily reflects the charges for the less costly components of the package. But Kemper was not selecting a limited number of stations and demanding them at the average package price; it insists it was willing to pay for its limited 95 station lineup what ABC was demanding for all 130 stations. The trial judge seemed more certain than we are that in its May 4th order Kemper substituted the 28 more expensive for the 32 cheaper stations.[18] In any event, regardless of how Kemper arrived at the figures it used in its May 4th order, we are still faced with Kemper's claim that it was re-

[18] As we understand the parties' contentions, there are two different equations submitted for arriving at the figures in Kemper's May 4th order. Kemper claims it was willing to pay for 67 of 99 stations the $15,750 ABC was asking for the full lineup of 99. It asserts that it added to this figure the $3,000 charge for the 28 additional stations it wanted, to arrive at the $18,750 station time charge found in its May 4th order. ABC claims that Kemper treated all 99 stations as fungible and deducted a proportional amount ($2,871.23) for the 32 unwanted stations from the time charge used at the April 27th meeting. It then added $5,588.88—the discounted rate for the 28 stations it wanted—to arrive at a figure of $18,467.65, which was rounded to $18,750 in the May 4th letter.

It is apparent that either theory would account for the figure Kemper used. While it is relatively clear that Kemper, in an intra-office memo sometime previous to the April 27th meeting, employed the method of computation suggested by ABC, an official of the Frank agency swore in an affidavit submitted on the motion that these earlier computations were not reflected in Kemper's orders. We have already indicated in part II that on a motion for summary judgment, with no opportunity to evaluate the demeanor of the witnesses, it is not the function of the court to determine whether the affiant is telling the truth or that he seems "persuasive." We note in this connection that it is not obvious to us why Kemper should have used a figure of $5,588.88 for the 28 extra stations when ABC had previously stated at the April 27th meeting that it would agree to charge only $3,000.

questing fewer stations than ABC was offering at the price ABC was demanding. And, under the circumstances of this case, we do not think it is an answer to say that the rate card prices to which ABC reverted were pre-established. Apparently, full rate card prices were never charged by ABC. Moreover, to hold that a seller can avoid the impact of the *Loew's* rationale merely by setting a pre-established price for each individual item—even if that price is rarely if ever charged and is, in relation to the package price, fanciful and unjustified by cost—would mean that the anti-trust laws could be flouted at will.

On the incomplete record before us, we find it impossible to determine whether there were justified cost differentials between ABC's individual and package prices. The extent of the extra administrative burden, if any, that ABC would incur if it had to negotiate on a less than full lineup basis is unclear. And, Kemper maintains steadfastly that ABC would incur no cost by having to black out the unwanted stations. While there are suggestions in the record that would seem to lend some support to this contention, it is possible that although blacking out involves no cost to the *network,* it would impose a substantial burden on the individual stations—a burden which might ultimately have to be borne by the network. In any event, additional evidence is needed before a determination can be made that ABC's pricing differentials were justified by costs.

As we have already noted, the District Judge found that Kemper never attempted to negotiate with ABC after it rejected its May 4th letter order. Judge Tenney seems to suggest that Kemper had a duty to approach the hierarchy of officialdom at ABC's New York office with respect to a discount on its selected lineup, and should not have been content to accept the rejection it received from the lower

echelon in the network's Chicago sales office. But the law does not demand that Kemper joust with windmills; it would have been reasonable to require it to negotiate only if there was a chance of success. If all the inferences are resolved in favor of Kemper—as we are required to do on ABC's motion for summary judgment, United States v. Diebold, supra—we believe that on the record before us it is a disputed issue of fact whether, under all the circumstances of this case, it was reasonable to have required Kemper to attempt to negotiate further after ABC rejected its order.

Kemper has insisted in these summary proceedings that ABC adamantly refused to sell the desired lineup at other than rate card. And, an ABC official asserted that he had been told by his superior that "if they [Kemper] insist on a specific lineup, they must pay rate card." Of course, if this ABC policy was never communicated to Kemper, it could not have been a factor in the decision not to negotiate; but, this is not clear. It is also true that there was some evidence that at a meeting held on May 18th, Kemper was told that "we [ABC] would be willing to renegotiate the deal." However, the record also discloses that at another point in the meeting Kemper was told that the selected lineup would cost "rate card and then some." Moreover, an official of the Frank agency stated that after the May 18th meeting he was informed that "ABC New York" wanted Kemper to take the full lineup and the price seemingly was to be rate card. Following all these meetings and conversations, Kemper alleges that it concluded that any further efforts to get ABC to modify its position would be doomed to failure. Consequently, it capitulated and

agreed to ABC's terms.[19] It is apparent to us that the facts underlying the negotiations are in serious conflict and thus it is impossible to resolve them on this motion or to draw inferences adverse to Kemper, as would be necessary for a holding that Kemper's refusal to negotiate was unreasonable.[20]

VI.

In sum, we are of the opinion that this case was not ripe for summary judgment. While this matter has already been pending for an inordinate amount of time, we cannot grant or withhold summary judgment merely because it would save time or expense. Cf. 3 Barron & Holtzoff, supra, § 1231 (1967 supp.). We suggest in the interest of judicial economy, however, that the District Court first determine

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[19] The District Court placed great emphasis on a number of Kemper memoranda that did not indicate the lineup problem was of importance to the company. The significance of many of these documents without further evidence must be discounted, however, since they were written after Kemper alleges it capitulated to ABC's demands.

[20] We frankly find the positions advanced by both parties in this summary proceeding somewhat puzzling and incongruous. Kemper claims it refused extra stations although they would cost nothing additional because it could not adequately service potential customers. ABC, on the other hand, apparently insisted that Kemper take something for nothing, allegedly because it would be expensive to cut out the unwanted stations. But when Kemper ordered its limited lineup, ABC did not respond "you can have your lineup at the package rate but you will, of course, have to pay any expenses we will incur by cutting out stations." Instead, it spoke of "rate card and then some"—to an important customer—although it apparently never charged anyone rate card. The only fact of possible monetary significance that we can detect between Kemper's offer and ABC's counteroffer is that Kemper stipulated that the charge "shall be reduced by the package rate of any station not clearing." But the maximum price effect appears to be relatively insignificant and it does not rationalize for us the positions of the parties.

at trial whether it was reasonable for Kemper not to have attempted to negotiate further. A negative answer based on adequate evidence and findings would obviate the need for further proceedings with respect to the issues discussed in part IV of this opinion.[21]

Summary judgment in favor of ABC is reversed.

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[21] Another issue, not raised by ABC, which could well be explored before confronting the important and difficult problem of application of the "tie-in" principle to network broadcasting, is the possible bearing of Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959). The principal, indeed almost the sole, item of damage which plaintiffs seek to recover is the state court judgment for their breach of contract committed for a reason wholly unrelated to the antitrust laws; if, under *Kelly*, the antitrust laws did not give Kemper a valid antitrust defense to that suit, they can hardly permit it to recover three times the amount of the judgment. The case arguably differs from *Kelly* in that here the contract included the sale of something alleged to constitute an illegal tie-in; however, it is also unlike Associated Press v. Taft-Ingalls Corp., 341 F.2d 753 (6th Cir.), cert. denied, 382 U.S. 820, 86 S.Ct. 47, 15 L.Ed.2d 66 (1965) in that, although the record is not completely clear on this point, the price for the entire package of 130 stations appears to have been no greater than Kemper was willing to pay for the 95 stations they wanted. We note also that the discussion in *Kelly* assumed that there was a "lawful sale *for a fair consideration*," 358 U.S. at 521, 79 S.Ct. at 432 (emphasis supplied), a fact upon which the District Court made no findings.

APPENDIX B

Opinion and Order of Tenney, D.J. Dated March 17, 1970 Granting Judgment for Defendant After Trial

(Entered March 17, 1970)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, FEDERAL MUTUAL INSURANCE COMPANY and LUMBERMENS MUTUAL CASUALTY COMPANY,

Plaintiffs,

—against—

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Defendant.

63 Civil 1492

OPINION

TENNEY, J.

Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, the trial of a single issue in a complicated private anti-trust suit has been conducted before me without a jury "in furtherance of convenience".[1] In its opinion herein,

[1] There is, of course, ample authority for such procedure. *Reines Distributors, Inc.* v. *Admiral Corp.*, 257 F. Supp. 619 (S.D.N.Y. 1965); *Sogmose Realties, Inc.* v. *Twentieth Century Fox Film Corp.*, 15 F.R.D. 496 (S.D.N.Y. 1954).

which reversed the opinion of this Court granting summary judgment to defendant (reported in 270 F. Supp. 619), the Court of Appeals for the Second Circuit suggested "in the interest of judicial economy . . . that the District Court first determine at trial whether it was reasonable for [plaintiffs] not to have attempted to negotiate further", since "[a] negative answer based on adequate evidence and findings would obviate the need for further proceedings" as to whether only a single "product" [2] was involved. 388 F.2d 272, 285-86. The nature and prior history of the litigation is set forth in 270 F. Supp. 620-21 and will not be repeated in detail herein.

Plaintiffs, widely known as the Kemper Insurance Companies (herein collectively referred to as "Kemper") entered into an agreement dated August 15, 1962 with defendant, American Broadcasting-Paramount Theatres, Inc. (hereinafter referred to as "ABC") for the sponsorship of a television program "Evening Report" over the ABC network, which Kemper now asserts is illegal and unenforceable under Section 1 of the Sherman Anti-Trust Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964), and, on the basis of such illegality, Kemper seeks treble damages. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964). In the decision on Kemper's motion for summary judgment and ABC's cross-motion for the same relief, ABC's cross-motion was granted on the ground that "only one product was involved herein as a matter of law—whether we denominate

[2] It should be noted that the Court of Appeals reached no determination as to whether more than one product was involved. "In order that our decision not be misconstrued, it should be emphasized that we do not now hold that more than one 'product' is involved in the sale of commercial time over many stations; we merely hold that additional evidence and clarification is required." 388 F.2d at 283 (note omitted).

the 'product' as the privilege of having the sponsor identified as sponsor and making use of the permissible portion of the broadcast for advertising its products—or whether we denominate it as the sale of an economically and reasonably justifiable combination of components". 270 F. Supp. at 649. The Court further concluded "that even were two distinct products involved, the necessary element of coercion, economic or otherwise, has not been proven". *Id.* at 649. In its opinion, reversing the order of this Court granting defendant summary judgment, the Circuit Court held, among other things, "that the facts underlying the negotiations are in serious conflict and thus it is impossible to resolve them on . . . [the motion for summary judgment] or to draw inferences adverse to Kemper, as would be necessary for a holding that Kemper's refusal to negotiate [with respect to the desired lineup] was unreasonable". 388 F.2d at 285. Accordingly, as already noted, it was suggested that this Court determine "whether it was reasonable for Kemper not to have attempted to negotiate further" with respect to the desired lineup. A trial of this issue has been held,[3] and for the reasons hereinafter set

[3] Actually, the Court has been compelled to base its determination on substantially the same evidence as was before it on the motion for summary judgment. The trial herein consumed three days during which times seven witnesses were examined and some 530 pages of testimony elicited. However, six of these seven witnesses had been deposed by the parties prior to the motion for summary judgment and such depositions were considered on said motion. Only the testimony of Marquis B. Smith and exhibits relating thereto which dealt with the preparation of lists of TV markets in order of importance to Kemper constituted essentially new matter. (Pltf. Exhs. 1, 2, 3, 4, 6.) The Court, however, has again carefully considered all prior depositions and documentary evidence to the extent that they have been made a part of the trial record together with the testimony referred to above. The witnesses who testified added little to their prior depositions except, perhaps, by way of contradiction.

forth I find that Kemper (assuming for the purpose of the trial of this issue that the specific lineup was an important consideration to plaintiffs) acted unreasonably in failing to negotiate further with ABC in this regard after May 18, 1962.[4]

THE FACTS

On January 25, 1962, Buckingham W. Gunn, senior vice president and director of broadcasting services of the Frank Agency, went to New York City to talk with personnel of ABC regarding possible sponsorship by Kemper of a then-current news program entitled "Evening Report", at which time he spoke with Mr. Edgar Scherick, ABC's vice president in charge of TV network sales, Mr. James Hagerty, and a Mr. Lang. Mr. Hagerty's responsibility was to promote ABC's News program. (T. 360.)[5] Mr. Gunn also spoke with the representatives of the other two major networks, *i.e.*, National Broadcasting Company (NBC) and Columbia Broadcasting System (CBS) in connection with certain sports programs. On the occasion of Mr. Gunn's conference with Mr. Scherick, Mr. Hagerty and Mr. Lang, Mr. Lang mentioned that he had been discussing "Evening Report" with Mr. Gunn, and Mr. Scherick made some very complimentary statements about the current success of "Evening Report", stating "that they were most anxious to sell it" and that "they would make [Kemper] a very good deal, he felt, from ABC's point of view."

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[4] As will be developed more fully hereinafter, either May 18 or May 23 would appear to be a more equitable cut-off date if any date prior to the contract date is used,—rather than the earlier date suggested by plaintiffs' counsel. Whichever of the two dates is used does not affect the conclusions reached herein.

[5] Reference is, in each case, to trial transcript and page.

(T. 331-34; Def. Supp. Exh. BB at 2-6.) Mr. Gunn asked Mr. Scherick how many stations "Evening Report" was carrying or would deliver in the fall of 1962, and was told "approximately 120 stations". Mr. Gunn had received a list of stations some time during 1961, and did not ask Mr. Scherick at this meeting for such a list or what cities were involved. (Def. Supp. Exh. BB at 16-18.) The program was being offered on the basis of 15-minute segments, 5 days a week, and Mr. Scherick stated that if the Frank Agency could interest Kemper in sponsoring 2 segments a week, he would give them "a good price" per segment; "15,000 for time and $7,000 for show—program".

At this time, ABC had an offering sheet in effect which was dated October 3, 1961 (effective September 25, 1961) (Def. Exh. B), which offered the ABC "Evening Report" program series to advertisers in one-quarter hour segments for each of 5 days in each week and for periods of 13 or 26 weeks. A cleared lineup of 100 stations, as of October 1, 1961, was attached.[6] The program price was set at $6,210.00 and the gross rate card time charges, based on the rate card charges of the 100 stations listed, were set at $29,141.00, to which was added a contingency allowance of $859.00 for additional stations and rate increases or a total gross rate charge of $30,000.00. As to the gross rate charge, a special discount was offered "in lieu of all other discounts under ABC-TV's current Rate Card" depending on the number of segments purchased. Thus for 2 segments per week for 26 weeks (52 segments) it gave a discount of 35 per cent and for 1 segment per week for 26 weeks (26 segments) it gave a discount of 30 per cent. By deducting the appropri-

[6] The program was first televised in September of 1961. (T. 270.) The October lineup differed from the February 1962 list since it showed Miami as clearing in October 1961.

ate discount from the gross rate charge of $30,000.00 and adding the program price of $6,210.00 plus $500.00 commission, it offered the 52 segments at $26,210.00 per segment (or a total of $1,362,920.00) and the 26 segments at $27,710.00 per segment (or a total of $720,460.00) over the 26-week period. The offering sheet stated the "Advertisers may elect to purchase under the current ABC-TV Rate Card if discounts are more favorable" and that "All orders are subject to acceptance by ABC-TV, New York."

No networking charges were mentioned at this meeting of January 25. (Def. Supp. Exh. BB at 6.) According to Mr. Scherick, the $22,000.00 figure was "set in the back room" and approved by him for the meeting with Mr. Gunn. (T. 353.) Apparently no commitment was made at that time other than Gunn's statement that he would report the offer to Kemper.

On March 23, 1962, Mr. John Beebe, a TV account executive and salesman for "Evening Report" in ABC's Chicago office, wrote Mr. Gunn referring to a prior discussion, stating that the program has been "averaging close to 3,000,000 homes a night. That tied in with the price that Ed Scherick gave you of $22,000 per quarter-hour for 2½ minutes of commercial time makes this an extremely efficient buy. As I pointed out to you yesterday, rate card per quarter-hour comes in at $36,250. At the special package price offer to you this would be $66,000 a week for 13 weeks, for a total cost of $858,000 for the 13 weeks beginning in October. We would like very much to give you a full scale presentation on just what ABC NEWS could do for Kemper. Please give us a hearing." (Def. Supp. Exh. II.) On the same date, William C. Gillogly, vice president in charge of sales (television) in ABC's Chicago office, sent a memorandum to Mr. Scherick in New York confirming a telephone conversation

earlier that day and reminding him that he (Scherick) "made a quote to Buck Gunn on behalf of Kemper Insurance of $22,000 per quarter for two quarters a week for 26 weeks of 'Early News'. This is roughly 50% plus discount on time. Buck is actually going with this figure, but you are going to recheck whether its okay." (Def. Exh. W.) Mr. Scherick replied to Mr. Gillogly by telegram on March 26, 1962 "quote to Gunn Kemper Insurance for Early News Okay". (Def. Exh. X.) To Mr. Scherick's knowledge Kemper had not actually ordered two segments at $22,000 at that time (T. 337) in spite of Mr. Gillogly's statement in his letter of March 23, 1968 that "Buck is actually going with this figure". Thereafter on March 28, 1962 Mr. Beebe wrote Mr. Gunn enclosing "all of the available material we have here on our EARLY NEWS. I think there might be some interesting statistics that you could cull out and pass on to Art Roberts or Mr. DeMark. . . . As I said to you on the phone, if there is any concrete interest on part of Kemper in our NEWS, we would be most happy to prepare a booklet or a full scale presentation and it's conceivable we could employ the services of Mr. Hagerty in helping us to finalize the deal." (Def. Supp. Exh. JJ.) One of the enclosures in Mr. Beebe's letter may have been a list of stations carrying "Evening Report" as of February 1962, in which 99 stations were listed. (Def. Exh. A, attached station lineup.) In any event, Mr. Gunn had received such a list from Mr. Beebe by the first week in April. (Pltf. Supp. Exh. 24, Deposition of Mr. Gunn at 2-3.) After Mr. Gunn received the list of stations he instructed his secretary, Miss Flannery, "to check Mr. DeMark and give him the list of these stations." (*Id.* at 5.) Mr. DeMark had been advertising manager of Kemper since 1960. After reviewing the list of stations, Mr. DeMark indicated to Mr.

Gunn over the telephone on April 16, 1962, that "[t]here are some stations on this list that we are not interested in," after which Mr. Gunn's secretary got on the telephone with Mr. DeMark and marked down on a copy of the February lineup those stations which Kemper did not want. (Pltf. Exh. 11; Pltf. Supp. Exh. 24, Deposition of Mr. Gunn at 4-8.) These stations were not taken from any analysis in Mr. DeMark's possession but he did it "off the top of . . . [his] head". (Pltf. Exh. 10; T. 135.)

Some time prior to April 17, 1962, Mr. Gunn prepared a brochure dated April 17, 1962, on behalf of the Frank Agency, entitled "1962 Television Recommendation for Kemper Insurance Group, ABC-TV Evening Report", referred to herein as the "Silver Report" (Def. Exh. A), which he showed to Mr. Gillogly on the morning of April 17th, prior to attending a previously arranged meeting at the Kemper offices in Chicago.[7] At that time, they "discussed the fact that there were some stations which were not wanted. The gist of that conversation was 'Let's not worry about that now. *Let's sell the program and we will worry about that later.*'" (Def. Supp. Exh. BB at 7-9.) (Emphasis added.) Whereupon Mr. Gunn, Mr. Gillogly, together with Mr. Bowman Kreer and Mr. Beebe, went first to Mr. DeMark's office and then to the offices of Norris Flanagin, the chairman, vice chairman, president or vice president of certain of the insurance companies forming the

[7] It appears highly probable that the recommendations in the Silver Report were prepared before the list of stations attached to those recommendations was prepared. (Pltf. Supp. Exh. 24, Deposition of Mr. Gunn at 11-12.) Nowhere in the body of the report is there any mention of unwanted stations. I view with skepticism Mr. DeMark's testimony that the Silver Report was prepared in the period following his conversation with Mr. Gunn's secretary on April 16 and the presentation of the report on April 17. (T. 131.)

Kemper Group (Def. Supp. Exh. BB, at 10-11; CC at 1), to present the Silver Report. (Def. Exh. A.)

It is stated at page 2 of this report:

> "At this precise moment the ABC EVENING REPORT can be bought in a number of ways. Squibb, who has sponsored 3 segments a week this year, will probably return in the fall. (American Tobacco, Block Drug, and Schick are other interested advertisers.) According to ABC-TV's rate card, a one-segment-a-week sponsor pays a higher rate-per-segment than a two-a-week sponsor, who in turn pays a higher rate than a three-a-week sponsor, and so on. The rate card per quarter-hour-segment calls for $36,250 per segment, time and program, commissionable. However, when the agency went to New York to discuss programming for Kemper with the network's chief executives, *we were able to get a special reduced per-segment price of $22,000, time and program, commissionable. This represents a discount of approximately 40 percent.*" (Def. Exh. A.) (Emphasis added.)

Four sponsorship plans were outlined on the same page: (a) two ¼ hour segments per week over a 26-week period at $22,000 per segment; (b) two segments one week, one segment the next week, over a 26-week period at $22,000 per segment; (c) one segment a week over a 26-week period for an estimated $25,000 per segment; and (d) one segment a week over a 13-week period for an estimated $27,500 per segment (to combine with All-Star Golf, also sponsored by Kemper). The Frank Agency recommended "(b)", namely, the purchase of sponsorship "for 26 weeks on the rotation of two segments one week, one segment the next" at $22,000

per segment. Attached to the Silver Report was a new list for the coming fall, identifying 99 stations that had already cleared, and an additional 28 stations desired by Kemper which had not cleared and which were not part of any then-going lineup. Of these 28 stations 15 were listed as "pending" and 13 as "non-clear". As stated at page 3 of the report, "It is to be hoped that sponsorship by Kemper and a continuing effort by ABC and the agency will move the 'pending' stations to the 'cleared' list by fall and perhaps altho [sic] it is doubtful, some of the 'non-clear' stations as well." (Def. Exh. A at 3.) Although no mention of unwanted stations is contained in the report itself, on the list of stations attached thereto 20 stations are marked with asterisks as being "markets Kemper does not want".

These 20 stations are the same ones which Mr. DeMark took "off the top of [his] head" at the time he spoke with Mr. Gunn's secretary on the previous day. (Deposition of Patricia A. Flannery, dated July 22, 1964, Pltf. Supp. Exh. 24 at 1-6.) Mr. DeMark, in reaching his conclusion as to the stations which Kemper did not want, did not, at the time the Silver Report was prepared, have the updated analysis which was being prepared by Marquis B. Smith, Supervisor of National Advertising with Kemper. The analysis was originally prepared in the spring of 1959 and completed in September of that year. (Pltf. Exh. 1; T. 4.) Mr. Smith obtained from Kemper's statistical department a summary of Kemper insurance agents on a state and city basis, combined the cities into counties and came up with the number of agents and premium volume by county. He also obtained relevant television coverage, *i.e.*, the percentage of TV homes in each county that watched a particular station (obtained from the Nielsen Station Index) and com-

bined this on a chart covering each county in which Kemper had one or more agents. (T. 4-5.) Acting on a recommended figure of 40 per cent and better than any other station as minimum coverage, he developed a list of TV markets in order of importance based on 1958 premium volume. (Pltf. Exh. 2; T. 11-12.) He had received a request from Mr. DeMark around the middle of March 1962 to update the analysis, which he did using the 1960 premium figures since the 1961 figures were not available. (T. 15.) In April 1962, Mr. DeMark asked him for a list of TV markets for ABC's "Evening Report" in order of importance, which list was completed by April 23, 1962, based on the 1958 premiums. It was not revised to show the 1960 premium coverage until some time in May 1962. (Pltf. Exhs. 3, 4; T. 15-18.) It seems probable that some, if not all, of these analyses were available at the time the letter of May 4, 1962, discussed hereinafter, was prepared.

The meeting of April 17th at Mr. Flanagin's office was attended by Messrs. Gillogly and Beebe on behalf of ABC, Messrs. Gunn and Roberts on behalf of the Frank Agency, and by Messrs. Flanagin, DeMark, Bowman Kreer, and possibly a Mr. Robertson on behalf of Kemper. There is agreement that the subject matter of the conference was the presentation of the "Silver Report". It is also apparent that Mr. Gillogly was primarily concerned with "selling" the program. (T. 503.) Admittedly, there was discussion about the 20 unwanted stations, but if they were a concern they were not a major concern. (T. 164, 205, 206, 369.) Indeed, Mr. DeMark testified he did not mention the unwanted stations the following day in his memorandum of April 18th to Mr. Kemper (with copy to Mr. Flanagin) because he did not feel it was a major problem at that time. Nor was it mentioned in Mr. Kemper's letter to Mr.

Hagerty, dated April 25, 1962, one week later. (Def. Exhs. E, S; T. 224.) It is not disputed that the necessity of obtaining additional stations and a change of time for the Chicago station were discussed at this meeting. (Def. Supp. Exhs. BB, Deposition of Mr. Gunn at 14; CC, Deposition of Mr. Flanagan at 2; GG, Deposition of Mr. Beebe at 29; T. 370-72.) But nobody at the meeting suggested that Mr. DeMark send an order letter for other than the then-going lineup. (T. 378.) "[I]t was left that we were still trying to get additional stations for them and we were going to contact New York once again to get additional markets for them. . . ." (Def. Supp. Exh. GG, Deposition of Mr. Beebe at 29.)

As already mentioned, on the day following the meeting of April 17th, Mr. DeMark sent a memorandum to Mr. Kemper, which is set forth hereinafter substantially in its entirety.

> "As you know, we have been negotiating with ABC-TV regarding sponsorship of its Evening Report network news show.
>
> In view of the fact that there are a number of important markets which are not now carrying the show and because of the 5:30 time period for the show in Chicago, we are recommending that we order the show on the basis of two times one week and one time the next week on an alternating week basis for a 26 week period contingent upon the following:
>
> include a list of *stations that 'must' carry* the show and a change of time in Chicago.
>
> reserve the right to cut back to a one time per week basis at a cost of $24,000 per program with

the cost of the *additional stations to be added at the same pro-rated discount price.*

Cost for the program if the *additional stations* ordered carry the show would be approximately $950,000 to $975,000. This would give us the program in the markets important to us and better than twice the amount of commercial time than we could obtain with the other programs we have investigated.

Cost if we cut back because the *additional stations* do not clear the time will be $624,000 plus pro-rated costs of those *additional stations* which do clear.

If the stations do not clear, cutting back would allow us to purchase local shows in those markets. It would also allow us to consider beefing up our television advertising in Chicago if the Chicago time cannot be changed satisfactorily, and perhaps give consideration to advertising on golf spectaculars and thus keep our identification with the golfing audience which we have built up over the last two years.

In our negotiations with ABC, we have obtained a 33⅓–40 per cent reduction in the cost of the show for time and program.

Among those *markets* about which we are concerned *which have not cleared* for the show are: Buffalo, Cleveland, Columbus, Miami, Raleigh, Syracuse, Charlotte, Jackson, Miss., Milwaukee, Providence and Rochester. And, of course, *we are concerned with the 5:30 p.m. time presently scheduled for the show in Chicago.*

> Last Monday over the telephone you mentioned that you would be glad to write a letter to Mr. Hagerty regarding our *problem markets. If you approve our giving an order to ABC* on the basis as outlined above, *we would most appreciate your writing Mr. Hagerty* calling attention to our problem with specific reference to the poor time the show is carried in Chicago (5:30 p.m. Central time) and that, because this is our headquarters city, it is of utmost importance to our companies that we obtain a time after 6 p.m.
>
> Do you approve?" (Def. Exh. E.) (Emphasis added.)

No mention is made of unwanted stations or of any reduction or non-reduction in cost by reason of the elimination of such stations. The clear emphasis is on the additional "must" stations.[8]

On April 23, 1962, Mr. DeMark and Mr. Kemper discussed Mr. DeMark's recommendation of April 18 over the telephone. Mr. DeMark noted on a copy of the memorandum "OK per phone from JSK 4/23" and "Mr. JSK's first reaction after I read letter to him was to order . . . [one time] basis. Then, after reading my letter which was just delivered he said OK to recommendation as proposed" (Def. Exh. E), *i.e.*, "on the basis of two times one week and one time the next week on an alternating week basis for a 26 week period contingent" on the important market sta-

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[8] The Circuit Court of Appeals noted, 388 F.2d 272, 285, n.19, that this Court "placed great emphasis on a number of Kemper memoranda that did not indicate the lineup problem was of importance to the company" but that "[t]he significance of many of these documents without further evidence must be discounted, however, since they were written after Kemper alleges it capitulated to ABC's demands." The memorandum of April 18, of course, preceded any such "capitulation".

tions and a change of time in Chicago plus the right to cut back to one time per week as set forth in Mr. DeMark's letter. (Def. Exh. E; T. 165-66.) Thereafter, on April 25, Mr. Gillogly telegraphed from Chicago to Mr. Slocum Chapin, his superior at ABC in New York, as follows: "FOR THE RECORD THIS WILL *CONFIRM* THAT WE HAVE *VERBAL* ORDER FROM CLINTON FRANK ON BEHALF OF KEMPER INSURANCE FOR 39 QUARTER HOURS OVER 26 WEEKS OF THE EVENING REPORT STARTING IN OCTOBER. EXPECT WRITTEN ORDER SHORTLY." (Def. Exh. Y.) (Emphasis added.) Mr. Gillogly testified that before sending this telegram he had talked with Mr. Gunn on the telephone. Mr. Gunn "indicated that as a result of the previous week's meeting that it looked like we were over the hump, and we were going to go forward on this buy; and I asked him what we were talking about, and he said we were talking in terms of 39 quarter hours over a 26-week period. I said, 'Great, does that constitute an order?' He said words to the effect that 'I would think so' . . . ." (T. 375-76.) Mr. Gunn did not recall telling Mr. Gillogly that they "had a verbal" order, but did remember telling Mr. Gillogly and probably Mr. Beebe "that things were going well and that we would probably, within the next few weeks, send them an order for 'Evening Report'." (Def. Supp. Exh. BB, Deposition of Mr. Gunn at 16.) However, Mr. Gillogly testified that so far as he was concerned ABC had a verbal order from the Frank Agency on April 25, 1962.[9] (T. 377.) On the same date as Mr. Gillogly's telegram, Mr. Kemper

[9] Both Mr. DeMark and Mr. Gillogly testified that it was "quite common" or "customary" for advertising agencies and networks to make commitments for advertising without having a signed contract. (T. 198-99, 376.)

wrote Mr. James C. Hagerty,[10] a vice president of ABC, that Kemper was "trying to do some business with ABC but the operation is not as simple as it should be. We have *several problems,* one of which is the time your show is on in Chicago; another the fact that *your people have not been able to clear with a number of markets important to us,* for example, Charlotte, North Carolina, and Rochester, New York. It should be helpful to the overall objective if you could get into this yourself and see what could be done to put the show on the road." (Def. Exh. S.) (Emphasis added.) This letter was apparently written by Mr. Kemper in response to Mr. DeMark's request in his memorandum of April 18 that he seek Mr. Hagerty's assistance "[i]f you approve our giving an order to ABC". (Def. Exh. E at 2.)

In the meantime, work was apparently going forward culminating in a meeting called at the Frank Agency for April 27, 1962. On April 20, 1962, Mr. Balle of sales service, ABC-TV network, wrote Miss Mary Alice Crisafulli, a "time buyer" of the Frank Agency (Def. Supp. Exh. EE; Def. Supp. Exh. DD, Deposition of Miss Crisafulli at 1), enclosing a copy of "the current ABC network rate card effective April 1, 1961" (Def. Exh. V) and noting that her "question concerning station rate increases is fully covered under the rate protection clause on page two." (Def. Supp. Exh. EE.) On the basis of this rate card, she made certain computations bearing the date April 27 (Def. Supp. Exh. FF). Miss Crisafulli worked for Mr. Trude who asked her to make cost comparisons of the then-going lineup with the

[10] Mr. Kemper's failure to mention the problem of unwanted stations is significant if he was aware of the problem. Mr. Kemper was on a first name basis with Mr. Hagerty and it is reasonable to assume that the latter was instrumental in getting this business for his new employer, ABC.

cost of the markets Kemper desired the program carried on. (Def. Supp. Exh. DD, Deposition of Miss Crisafulli at 1-3; T. 69.) These computations reflected the time cost net of the then-going lineup of 99 stations at $15,750.00,[11] from which was deducted the 32 stations[12] which Kemper did not want, and for which the time cost net was figured at $2,871.33 (computed at a 47½ per cent discount, the same discount as that originally granted on the then-going lineup in January of 1962 in connection with the quotation of the $22,000 figure) and to which was added the net time cost of 15 stations then pending and which Kemper desired figured at $3,166.00 (again at the 47½ per cent discount), plus 5 "must" stations[13] (similarly discounted) at $1,218.00, and 8 additional non-cleared stations (similarly discounted) at $1,204.88, or a total for the "then wanted" stations of $18,467.65. (Def. Supp. Exhs. DD, Deposition

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[11] Miss Crisafulli figured the cost of the 99 stations in the then-going lineup at $29,787.00 based on the ABC rate card to which she applied a 47½ per cent discount and reached an approximate figure of $15,750.00 (actual $15,635.55). (Def. Supp. Exh. FF.) She then assumed that the program charge was $5,000.00 and the network charge was $500.00 in order to reach the "package rate" of $22,000 offered by ABC. Actually, the current offering sheet fixed the program price at $6,210.00. (Def. Exh. B at 2.) In her computations covering the unwanted and additional stations she used programming charges of $5,882.50.

[12] Actually the increase from 20 to 32 unwanted stations was accomplished by removing 1 station (Chattanooga) from the unwanted list and adding 13 (*i.e.*, Akron, Ohio; Augusta, Ga.; Erie, Pa.; Eugene, Ore.; Evansville, Ind.; Fort Wayne, Ind.; Harrisburg, Pa.; Salt Lake City, Utah; San Jose, Calif.; Waterbury, Conn.; Yakima, Wash.; and Youngstown, Ohio). This increase must have occurred between April 16, when Mr. DeMark dictated the list of 20 unwanted stations to Mr. Gunn's secretary, and April 17 when Miss Crisafulli prepared her computations.

[13] Charlotte, N.C.; Jackson, Miss.; Milwaukee, Wisc.; Providence, R.I.; Rochester, N.Y.

of Miss Crisafulli, and FF; Def. Exh. V.) In computing the costs of the additional stations she used the ABC rate card which had been furnished her by ABC. (Def. Supp. Exh. DD, Deposition of Miss Crisafulli at 8-9.) To the $18,467.65, Miss Crisafulli added gross programming charges of $5,882.50 (applying a 17.65 per cent commission rather than the 15 per cent rate) and gross networking charges of $500 for a total of $24,850.15 per segment on the basis of a Kemper selected 95 station lineup (Def. Supp. Exh. FF) for 39 segments. It seems quite clear that Miss Crisafulli worked from the "Evening Report" station lineup, a copy of which was attached to the Silver Report. (Def. Exh. A.) It was her computations, the Silver Report, and the ABC rate card which Mr. Trude had when he prepared the Frank Agency order letter of May 4, 1962. (T. 65, 69, 99.)[14] While there is no evidence that her computations were used at the meeting at the Frank Agency on April 27th, they bear that date.

The April 27th meeting was attended by Mr. Gillogly and Mr. Arne Nordmark, sales service manager for ABC in Chicago, and by Mr. DeMark for Kemper and Mr. Gunn, and possibly Mr. Trude,[15] for the Frank Agency, and Ruth Babick. (T. 167, 410-11.) Mr. Robertson of Kemper says he also attended as did Miss Crisafulli and Mr. Roberts. (Pltf. Supp. Exh. 24, Deposition of Mr. Robertson at 3.) The primary purpose of the meeting was to work out

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[14] The Court of Appeals noted, 388 F.2d 284, n.18, that on the motion for summary judgment "an official of the Frank Agency swore in an affidavit submitted on the motion that these earlier computations were not reflected in Kemper's orders." It seems clear that Mr. Trude had these figures when he prepared the May 4 order letter.

[15] Mr. Trude says he was not there. (T. 403.) Mr. Nordmark thought he was (T. 410), as did Mr. Gillogly (T. 379).

the details of the prior "order". (T. 410.) It was at this meeting that Mr. Gillogly, in order to "keep this order for this turkey", offered the 15 pending stations for $3,000 plus 13 stations at no charge in addition to the 99 station lineup offered at $22,000.[16] (T. 382-83, 443.) It was also agreed that the price for one segment per week or 26 segments would be $24,000. (T. 382, 445.) At that time, the $22,000 and $24,000 figures were not broken down into any component parts. (T. 384.) Indeed, it was the Frank Agency which first made the breakdown of these figures. (T. 239-41.) Until ABC received the May 4 letter there had never been such a breakdown. (T. 351, 365, 384, 395, 431, 459-62.) It was also agreed that although Kemper would order 39 segments over a 26-week period, it would have the right to reduce its order to one segment per week over the same period if within 30 days after the contract ABC could not clear all of the Kemper key markets. (T. 382, 385.) The price in the latter event for the 26 segments would be $24,000 per segment rather than $22,000 for the 39 segments. (T. 382.) Mr. DeMark testified that he again indicated he did not want certain stations and that Mr. Nordmark or Mr. Gillogly indicated they would "try it out" in New York. (T. 167-68.) Mr. Gillogly, however,

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[16] One of the misconceptions beclouding the issues herein is Kemper's assumption that the $3,000.00 charge for these 28 stations was disassociated from the "package" offers of $22,000.00 or $24,000.00 and that Kemper was thereafter entitled to this preferred rate whether it went along with the package deal or not. The $3,000.00 was less than the cost of the 15 stations then pending which Miss Crisafulli computed, using the 47½ per cent discount at $3,166.00, and almost one-half of the cost of all 28 stations which she computed at approximately $5,590.00, using the same discount. Yet Kemper, in subsequent negotiations, assumed its right to retain this benefit and reject the basis on which it had been offered. As will be noted later herein, there is a serious question whether the $3,000 figure was first mentioned on this date or on April 17.

testified that the "primary emphasis was on the additional markets." (T. 381.)

Whatever the understanding of the parties may have been after the April 27th meeting, on or about May 4, 1962 Mr. Trude, on behalf of the Frank Agency and acting on instructions from Mr. DeMark, sent an order letter to Mr. Beebe of ABC. (Pltf. Exh. 5; T. 36.) Attached to the letter were three pages constituting the "Ordered Station Lineup", which list had been prepared by Mr. Trude and Mr. DeMark. (T. 37.) That this lineup was prepared mainly for "bargaining" purposes seems clear. (T. 230.) Mr. DeMark had determined at the April 27th meeting that under the circumstances the only course was an order letter contingent on a station list "that gives ABC a bargaining position with a time restriction of one week." (*Id.*) The order letter was accompanied by a covering letter from Mr. Gunn to Mr. Beebe making provision for two matters not covered by the order letter, *i.e.*, (1) a Newsletter to be sent out each month to all Kemper agents over the signature of Ron Cochran (the program news broadcaster), and (2) the availability of Mr. James Hagerty at the Kemper sales meeting in Chicago on September 24 and 25, 1962. (Def. Exh. Z.) The letter ordered "Evening Report" for 39 segments over a 26-week period, two segments one week and one segment the next week on an alternating basis. The specific ordered lineup of 95 stations was made up of 67 of the 99 stations that had already cleared the program (Station List forming part of Pltf. Exh. 5 at 1 and 2, and last 3 stations at 3), plus 15 stations then pending (first 15 stations on Station List at 3), plus 13 stations not then cleared or pending (next 13 stations on Station List at 3). (T. 37-39.) The time charges were "a package

rate" not to exceed $18,750 gross, which charge was to "be reduced by the package rate of any station not clearing or not carrying the program by reason of preemption or other reasons." (Pltf. Exh. 5 at 2.) According to Mr. Trude, "[t]he basis of the $18,750 figure was the quoted rate of $15,750 for the 67 out of 99 clearance stations plus $3,000 which was for a group of 15 pending stations that this rate had been offered to us by ABC. And then there were 13 stations that would be indicated at no charge whatsoever." (T. 39-40.) In other words, Kemper apparently was "offering to pay ABC for 67 stations the same price that they were asking for 99 stations." (T. 218.) As to any of the 67 stations "not clearing or not carrying the program by reason of pre-emption or other reasons", Kemper would be credited with its "pro-rated share of the total amount of $15,750" (Pltf. Exh. 5 at 3; T. 41), and as to the 15 pending stations with the pro-rated share of the $3,000. (T. 41.) According to Mr. Trude, no credit would be given for any of the 13 stations for which no charge was made. (T. 41.) This contention, however, will be discussed more fully hereinafter. The price of $24,250 per segment in the order letter was not one lump sum, for it consisted of a $5,000 program charge, a $500 networking charge, and total time charges for the 95 stations in an amount not to exceed $18,750. The order letter referred to 41 "key markets" (12 of which were the locations of Kemper branch offices) of which 30 had cleared the program as of that date, and stated that "this order is contingent upon the clearance of these markets unless our client elects otherwise." (Pltf. Exh. 5 at 2.) Of the 12 key markets which were the locations of Kemper branch offices, only two, *i.e.*, Columbus, Ohio, and Syracuse, New York, had

not then cleared. It was also stated that if ABC could not clear all of the Kemper key markets by June 1, 1962 (a period of less than 4 weeks), the order would revert to an order for one segment per week over a 26-week period and, in such event, the maximum time charges (again with the prorated credit for non-clearances or preemptions) were to be $20,750 plus the $5,000 program charge and $500 networking charge, or a total of $26,250. In addition, Kemper was to have the right to cancel its sponsorship after the first 13 weeks upon 45 days' written notice. Finally, the Frank Agency requested "written acceptance to this order no later than May 11, 1962." (Pltf. Exh. 5 at 6.) The original letter bearing Mr. Nordmark's comments bears the notation next to the date fixed for acceptance: "NO EXTENSION GRANTED MAY 11 FIRM". (Def. Exh. Z at 6.)

After Mr. Beebe received the May 4 order letter he showed it to Mr. Nordmark, who noted the changes in the lineup of stations, after which Mr. Beebe called Mr. Gunn. (Def. Supp. Exh. GG, Deposition of Mr. Beebe at 29; T. 414-16.) Mr. Nordmark discussed the differences with Mr. Gillogly and Mr. Beebe and then called Mr. Trude of the Frank Agency and advised him "that the May 4 order letter that he submitted was not in agreement with the initial verbal order that was agreed between Mr. Gunn and Mr. Scherick." (T. 420-21.) Mr. Nordmark asked Mr. Gillogly for a breakdown of the original $22,000 figure. Mr. Gillogly told him they had to get $5,000 for the programming and network at $500 and to work it out backwards, which Mr. Nordmark did at the bottom of page 2 of the order letter (Def. Exh. Z at 2), and with a $750 commission reached time charges of $15,750, to which he added the $3,000 for

the additional stations. (T. 461-62.) Mr. Beebe told Mr. Gunn that the lineup varied substantially from the then-going lineup, that he thought the problem was more stations in addition to the lineup and, according to Mr. Beebe, Mr. Gunn said he did not write the letter and that he was surprised. (Def. Supp. Exh. GG, Deposition of Mr. Beebe at 30-31.) Mr. Beebe told Mr. Gunn that at the package price quoted he did not see how stations could be eliminated but if they were eliminated "it would cost" and that they "would have to renegotiate it and individual markets would have to be contacted." (*Id.* at 32.) The first two pages of the lineup specified by Kemper and attached to the order letter of May 4 (together with the last 3 stations listed on page 3 of the said lineup) listed 67 of the 99 stations then clearing, and the third page included 28 additional stations that had not cleared the program but that Kemper wanted to order. (Pltf. Exh. 5.) On the first page of the lineup attached to the copy of the order letter which he received from Mr. Beebe, Mr. Nordmark wrote: "No! to Pg. 1 & 2 of lineup—Then going lineup will negotiate on non-Kemper markets". (Def. Exh. Z, Ordered Station Lineup at 1; T. 416.) In the order letter itself, opposite the provision for an "ordered station lineup" of the 95 stations specified by Kemper, Mr. Nordmark noted: "No—see attached lineup for comment", and where Kemper's order letter, at page 2, specified the gross time charge of $18,750 for the "ordered station lineup", he noted: "O.K.—*But* based on 99 stations on our lineup plus Kemper 15 pending mks [markets]. See attached lineup." (Def. Ex. Z.) Mr. Henry Hede, vice president and administrative sales manager of ABC in New York, received a copy of the May 4 order letter (T. 271) and spoke with Mr. Nord-

mark on the phone, who told him Kemper was seeking a selective lineup rather than the then-going lineup. Mr. Hede told Mr. Nordmark he would check with Mr. Scherick (T. 272), which he did and was told by Mr. Scherick that if Kemper wanted to select its own stations it would have to go "rate card". (T. 273-76.) Mr. Hede reported back to Mr. Nordmark but never specifically instructed him to pass this on to Kemper. (T. 295.)

In response to the Frank Agency letter of May 4, ABC's leter of May 10, 1962 from I. Martin Pompadur, general sales attorney, acknowledged its receipt and confirmed ABC's "firm order therein . . . of . . . the KEMPER INSURANCE COMPANIES, for sponsorship of ABC EVENING REPORT . . . ." (Pltf. Exh. 7 at 1.) The order was characterized as "non-cancellable". Mr. DeMark received a copy of this letter from Mr. Trude, on which Mr. DeMark made various handwritten notes. (Pltf. Exh. 7; T. 138-39.) Sponsorship was to be of 39 segments over a 26-week period, commencing with the week of October 15, 1962. The letter stated that KEMPER "station lineup" would "consist of the then going lineup of ABC basic affiliated stations carrying the program as of each telecast of which you are a sponsor . . . ." (Pltf. Exh. 7 at 1.) The "then going lineup" was not specific as to the stations encompassed by that term. The time charges were to be a flat $15,750.00 per segment for a 39-segment program, or if Kemper reduced its sponsorship to one segment per week because of ABC's inability to clear all of the 41 Kemper key markets, the time charges were to be $17,750.00 per segment. In each case the program charge (plus 15 per cent commission) of $5,750 and the network charge of $500 were to be added. In addition, ABC agreed to order

on Kemper's behalf 15 additional stations, specifically identified with their individual time charges, at $3,000, plus 13 other stations for which Kemper was not required to pay any additional time charges. With respect to the additional 15 stations, totaling $3,000, Kemper was required to pay only for those actually clearing the program. Accordingly, the maximum total price per segment for sponsorship of 39 segments under the May 10 letter was $24,-250.00 or for 26 segments it was $26,250.00.

Thus, while Kemper in its order letter of May 4 was ordering 95 stations consisting of 67 of the 99 stations already cleared, plus the 15 stations then pending and the 13 stations not then cleared or pending at a total charge per segment of $24,250.00 for 39 segments or $26,250.00 for 26 segments to be "reduced by the package rate of any station not clearing or not carrying the program by reason of preemption or other reasons", ABC in its counter-offer or acceptance confirmed an order of the "then going lineup" (at that time 99 stations but which could well have included additional stations at each broadcast date) plus the 15 stations then pending and the 13 stations not then cleared or pending, a total of at least 127 stations subject to the same reduction rate for non-clearance, at a total charge per segment of $24,250.00 for 39 segments or $26,250.00 for 26 segments—*the very same figures for 127 or more stations as Kemper had offered for 95. In other words, it would appear that the 32 stations which Kemper did not want were offered to it free of charge.* However, as a practical matter, and as will be pointed out hereinafter, since Kemper made the reduction credit for non-clearance applicable to both the pending 15 and 13 not cleared or pending stations, whereas ABC made it applicable only to the 15 pending stations for which a charge was made,

these figures are somewhat deceiving. It cannot be claimed that the price which Kemper offered in its letter of May 4 was coerced. It was clearly not consistent with ABC's original package deal. And when Mr. Flanagin was asked whether an offer had been made to ABC for sponsorship of the program over the ordered station lineup at a price other than that set forth in the May 4 order letter, he stated: "It is an idea that didn't occur to us." (Def. Supp. Exh. CC, Deposition of Mr. Flanagin at 2.)

Following receipt of the May 10 letter, Mr. Trude spoke with Mr. DeMark and then with Mr. Nordmark in order to set up a meeting between representatives of ABC, Kemper and the Frank Agency at the Frank offices in Chicago, the date being set for May 18th (T. 42-46), in order to discuss the differences between the May 4 and May 10 letters. (T. 46-47.) Also, Mr. Nordmark went to ABC's offices around May 14 to confer with Mr. Hede (T. 477) and was told by him that "at that time . . . [ABC] would not sell the selected portion of the lineup at the package price of $22,000." (T. 297.) The meeting of May 18 was attended by Messrs. Nordmark and Beebe on behalf of ABC, by Mr. DeMark and Mr. Bruce Robertson on behalf of Kemper, and by Messrs. Gunn, Trude and Arthur Roberts, Bowman Kreer, and possibly Miss Crisafulli on behalf of the Frank Agency. (T. 47, 101, 118, 140, 422; Pltf. Supp. Exh. 24, Deposition of Mr. Beebe at 7.)

What occurred at the meeting is a matter of some dispute so far as the testimony of the participants is concerned. Mr. Nordmark testified that he told Mr. Trude that his list of stations did not compare with ABC's offering and that Mr. DeMark said that the existing lineup had certain stations Kemper did not want and that Kemper

wanted to add certain stations. (T. 425.) Mr. Nordmark also told Mr. Trude that if there were certain markets that Kemper did not want, ABC could blackout the Kemper commercials, but that the charge for this would be costly, "exorbitant, in fact". (T. 426.) Since, as already noted, the unwanted stations were not costing Kemper anything in light of its May 4 offer, any blackout charge would appear to have been an extravagance. Mr. DeMark testified that ABC was told Kemper did not want to carry some of the markets on the ABC list "because of the minimum or non-existent representation we had in some of the markets", that he "told ABC the need for getting clearance in certain of our key markets", and reference was made to the time situation in Chicago. (T. 140-41.)

However, the Court is not impressed with Kemper's alleged concern over "non-existent representation . . . in some of the markets." In the first place, of the 32 unwanted markets, Kemper had representation in all but 6, *i.e.*, Fargo, N.D., Grand Forks, N.D., Hays, Kans., Hayes Center, Neb., Kearney, Neb., and Pembina, N.D. (Pltf. Exh. G; T. 203.) Moreover, it had 5 agents in North Dakota, at least 15 in Nebraska, and 31 in Kansas. (Pltf. Exh. 1.) Mr. DeMark's explanation of the reasons for not advertising in these markets (T. 149-50) is scarcely convincing. Moreover, there is evidence that ABC was prepared to negotiate on markets where Kemper had no representation. (Def. Exh. Z.) As Mr. Smith admitted, Kemper, as a matter of practice, did take on agents and increase the number from time to time. (T. 29.) In addition, when the negotiations of April and May were in progress, Mr. Smith did not even have the premium figures for the prior year available. (T. 31.)

Mr. DeMark testified that he told ABC of the non-existent representation Kemper had in some of the markets and for the need of getting clearance in certain of their key markets with specific reference to certain stations and that he asked for a cancellation clause, that ABC asked him for clarification of Kemper's co-sponsor products requirements, and that there was discussion of the scheduling of commercial minutes and of the "morals clause" in the contract. (T. 141.)

Mr. Trude testified that the "substance" of the meeting was that the Frank Agency had ordered stations that it wanted rather than the stations offered, that there was disagreement over a cancellation clause which had been included in the May 4 letter, that co-sponsorship and a morals clause were discussed, as was the possibility of blacking out certain stations and the meaning of a "then going lineup", and that "ABC agreed to go back to New York and ask, No. 1, could we have a cancellation clause, and could we black out or have markets that we specifically wanted." (T. 48-50, 52.) Although Mr. Nordmark and Mr. Beebe indicated Kemper could not have a cancellation clause, "they agreed to go back to New York with regard to [the] cancellation clause and the stipulation that . . . [Kemper] take all the stations on . . . [ABC's] line." (T. 112, 141-43.) Indeed, Mr. Nordmark did go to New York and reported back to Mr. Trude either on the 21st or 22d of May that Kemper could not have the cancellation clause or specified ordered lineup, which information Mr. Trude passed on to Mr. DeMark. (T. 53.) Two or three days later, when they were preparing the second order letter, Mr. Trude again heard from Mr. Nordmark that they could have the ordered lineup at rate card. (T. 54, 85.)

Following the May 18 meeting, Mr. DeMark prepared a memorandum for Mr. Kemper dated May 21, 1962.

> "Friday we had a three hour meeting with ABC to discuss the problems which arose out of our order letter and ABC's *acceptance* letter.
>
> As you could expect from the length of the meeting, we went into the many ramifications of the order.
>
> Regarding co-sponsors, ABC said it had to stand firm on giving us what it considered to be broad protection against such products as hair preparations, patent medicines, tobacco and deodorants.
>
> However, it was agreed that if I could be more specific than the general categories, they could discuss with New York the possibility of not 'pushing' the program to specific advertisers.
>
> To reach a meeting of the minds, I could very much appreciate the opportunity to discuss this with you at your earliest convenience. Mrs. Carlson told me you would be in Fulton tomorrow but that you might be able to see me on Wednesday." (Def. Exh. F.) (Emphasis added.)

Here, again, no mention is made of "unwanted" stations, and ABC's letter of May 10 is characterized as an "acceptance" letter.

Mr. DeMark's memorandum was dated May 21, a Monday, and pursuant to his request he conferred with Mr. Kemper on Wednesday, May 23, the results of which conference were confirmed by memorandum to Mr. Kemper, dated May 24, a Thursday, and based on Mr. DeMark's notes of that conference. (Def. Exh. G.)

"On the basis of our discussion yesterday, we will get together with ABC on the purchase of the EVENING REPORT for 1 night a week for 26 weeks *without 'cross plugging' on any night.*

We discussed the following:

Co-sponsor compatibility—ABC's position and the broadness of our product category objections indicating that we included not only men's hair preparations but also women's.

Squibb Products—I reported that ABC informed us that Squibb would advertise aspirin, vitamins and its electric toothbrush. This you indicated was 'OK'.

Purchasers:

Squibb—2 shows per week for 26 weeks.

U. S. Plywood—1½ minutes per week for 26 weeks.

American Tobacco—American Tobacco is buying 3 minutes per week during the summer and has an option for open availabilities in the fall and winter.

Cancellation Clause—I reported that *ABC would not provide a cancellation clause* because Squibb and U. S. Plywood had purchased on a firm basis for 26 weeks and it was on this basis that ABC believes it can increase its network station line-up.

On the basis of the above, you then told me we should buy a night a week and *'be on by ourselves'.*" (Def. Exh. G.) (Emphasis added.)

Here, again, it is significant[17] that no mention is made of "unwanted" stations but rather of ABC's belief that "it can increase its network station line-up."

Mr. DeMark testified that he did not learn that ABC would not give Kemper a cancellation clause until possibly as late as May 23, the date of his conference with Mr. Kemper (Kemper never repeated its request after that), and that he did not learn that if they wanted their own lineup they would have to "go rate-card" until later that week after his conference with Mr. Kemper. (T. 145, 171-73.)

Much of plaintiff's case rests upon its claim that it did not negotiate further with respect to the unwanted stations because it was told that it could have its own lineup only if they went "rate-card". However, it now appears clear that Mr. DeMark did not hear that ABC would not give Kemper its own lineup of 95 stations unless they "went rate-card", until after Kemper had made the decision to order the then-going lineup. (T. 49, 52-54, 76-77, 112-13, 143-46, 170-73, 232-34, 237, 487-88.) Mr. Trude himself did not hear it until the draft letter of June 1 was already in preparation. (T. 54.) Thus, Kemper's decision to sponsor the program over the then-going lineup and to abandon its attempt to eliminate the 32 "undesired" stations could not have been made on the basis of any statement by ABC that Kemper would have to pay the rate-card time charges for the 95 stations that it wanted—a demand which Kemper characterized as "ridiculous" and "absurd". (T. 54, 146.) It is relevant to note the statement in the opinion of the Court of Appeals that "an ABC offi-

[17] While this memorandum might be considered as coming after Kemper alleges it capitulated, it reflects the circumstances of that "capitulation". See note 8, *supra*.

cial asserted that he had been told by his superior that 'if they [Kemper] insist on a specific lineup, they must pay rate card.' Of course, *if this ABC policy was never communicated to Kemper, it could not have been a factor in the decision not to negotiate . . . .*" 388 F.2d at 285. (Emphasis added.)

Following Mr. DeMark's meeting with Mr. Kemper, the Frank Agency prepared a draft order letter, dated June 1, 1962. (Def. Exh. H with Mr. DeMark's notes attached.) This cancelled and superseded the May 4 order letter and provided for sponsorship by Kemper over what was referred to as "the then-going lineup of ABC affiliated stations" plus the 28 additional stations Kemper wanted, although it provided that Kemper would not be required to accept any additional stations added to the then-going lineup after the date of the order. (Def. Exh. H.) Mr. DeMark prepared a page of notes relating to various paragraphs of the draft letter. Paragraph 3 of the draft letter read as follows:

> "The station lineup will consist of the *then-going lineup* of ABC affiliated stations, and the time charges are a package rate and shall not exceed $17,750.00 gross for one-quarter hour delivered.
>
> a. THE KEMPER INSURANCE COMPANIES shall not be required to accept any additional stations to the lineup shown as Group I on the *attached ordered station lineup* if they do not have representation in the added station market." (Def. Exh. H at 3.) (Emphasis added.)

Mr. DeMark noted, with respect to this paragraph: "discuss then going line-up". (Def. Exh. H at 1.) Although

substantially all of his suggestions relating to other paragraphs in the draft letter were incorporated in the final draft of June 5, 1962, no change was made in paragraph 3. (Pltf. Exh. 8 at 2.) However, the draft did have an ordered station lineup attached.

The June 5 order letter, prepared by the Frank Agency on behalf of Kemper, and based on the June 1 draft, differed from the ABC order letter of May 10 in that it was for only 1 segment per week over a 26-week period, and although the station lineup was to "consist of the then-going lineup of ABC affiliated stations" it was not, in effect, an order for a "then-going lineup" because Kemper was not required to accept any additional stations other than those shown as Group I on the attached ordered lineup, whereas an actual then-going lineup would have included all stations actually carrying the program on each date when Kemper's commercials were scheduled to appear. Included also in the lineup were the 15 additional stations (Group II) for which Kemper was to pay a maximum "package rate" of $3,000 time charges per segment, to be reduced by the individual time charges of stations failing to clear, plus the 13 stations (Group III) for which no charge was to be made to Kemper. Individual station time charges were set forth only for the 15 Group II stations. Program and networking charges of $5,000 and $500, respectively, remained unchanged. ABC guaranteed "a coverage of 75% of all U. S. television homes in the lineup" under Groups I and II with a credit to Kemper for failure to maintain this coverage. The draft had provided a credit equal to the percentage points of actual coverage less than 75 per cent, but, as suggested by Mr. DeMark, this limitation was eliminated in the letter of June 5. (Pltf. Exh. 8; Def. Exh. H.)

The Frank Agency order of June 5, 1962, on behalf of Kemper, was accepted by ABC one week later, on June 12, by telegram. (Def. Exh. I.) Such acceptance was subject to certain clarifications as to particular paragraphs of the June 5 letter. With respect to the "ordered station lineup attached" to the June 5 letter and referred to in paragraph 1, the telegram stated: "YOU UNDERSTAND THAT THE SPECIFIC STATONS [sic] AND TELEDAST [sic] PRIODS [sic] SET FORTH IN THE ATTACHMENT TO YOUR LETTER ARE IN ACCORDANCE WITH ABC'S CURRENT SCHEDULE, WHICH IS SUBJECT TOCHANGE [sic] ANY STATIONS FAILURE TO CLEAR SHALL NOT CONSTITUTE A BREACH OF ANY OBLIGATION. ABC RESERVES THE RIGHT TO SCHEDULE STATION BREAKS IN ACCORDANCE WITH ITS THEN CURRENT PLCY [sic]." (Def. Exh. I at 1.) With respect to the first paragraph on page 2 (Def. Exh. I at 2), the telegram requested substitution of the following: "OUR ORDERED STATION LINEUP SHALL CONSIST OF THE THEN GOING LINEUP OF ABC'S AFFILIATED STATIONS/ AS CURRENMVTLY [sic] SET FORTH IN GROUP I OF THE LINEUP ATTACHED HERTO/ [sic] AND *OUR TIME CHARGES SHALL BE IN ACCORDANCE WITH ABC'S APPLICABLE RATE CARD RATE SUBJECT TO A TIME DISCOUNT OF 38 PERCENT* IN LIEU OF ALL OTHER DISCOUNTS, NOTWITHSTANDING THE ABOVE, OUR TIME CHARGES PURSUANT TO THIS PARAGRAPH *SHALL NOT EXCEED $17,750* COMMISSIONABLE/ AFTER ADJUSTMENT FOR INTERRUPTION CREDITS/"—and in lieu of paragraph 4 of the order letter, the telegram (Def. Exh. I at 2) requested substitution of the following: "THE KEMPER IN-

SURANCE COMPANIES ALSO ORDER FIFTEEN /15/ ADDITIONAL MARKETS AND SHAL [sic] PAY TIME CHARGES THREFOR [sic] *IN ACCORDANCE WITH ABC'S APPLICABLE RATE CARD, SUBJECT TO A TIME DISCOUNT OF 45 PCT IN* LIEU OF ALL OTHER DISCOUNTS, NOTWITHSTANDING THE ABOVE, OUR TIME CHARGES PURSUANT TO THIS PARAGRAPH *SHALL NOT EXCEED $3,000 COMMISSIONABLE,* AFTER ADJUSTMENT FOR INTERRUPTION CREDIT/ THESE MARKETS ARE SHOWN ON THE ATTACHED ORDERED STATION LINEUP GROUP II." (Emphasis added.) With respect to paragraph 5 of the order letter (Def. Exh. I at 2) covering the 13 additional stations shown as Group III and for which no charge was made, the telegram merely noted "ACCEPTED". It was further provided that Kemper would "now be billed applicable time charges" which would "automatically be reduced by any non-clearance of stations." (Def. Exh. I at 2.)

On the following day, June 13, 1962, ABC issued to potential advertisers an offering sheet which listed a lineup of 100 cleared stations and a total price per segment of $36,250, consisting of an approximate gross time charge of $30,000 plus the program price of $5,750 and network charge of $500. (Def. Exh. U.) No provision was made for any special discounts; the offering sheet merely stated that the gross time charges were "subject to discounts as provided by ABC's then current Rate Card." (*Id.*)

On June 25, 1962, Mr. Trude wrote Mr. DeMark recapping the Frank Agency's current negotiations with ABC. In this letter he advised that "Paragraph 3 [of the order letter of June 5 as modified by the acceptance telegram of June 12] will be rewritten to show a 42.5% discount

[rather than a 38% discount] in lieu of all other discounts. This will bring us in at an exact figure of $17,750. *This means that we will be on a rate card basis less this discount,* and any station additions or station pre-emptions will be added to or reduced accordingly." (Def. Exh. J at 1.) (Emphasis added.) Opposite this particular paragraph of the letter is the handwritten notation by Mr. DeMark—"*what we asked for.*" (Emphasis added.)

On June 28, Mr. DeMark sent a further memorandum (Def. Exh. K) to Mr. Kemper reading as follows:

> "Roy Haller passed on your query as to how we were coming with the ABC News show and I indicated to him that *we were just about finished with our back and forth discussions* with ABC with regard to our order letters and ABC's acceptance letters.
>
> What I meant by the above was that *we have submitted two order letters to ABC replete with conditions and they have, as might be expected, sent us acceptance letters which were just as filled with conditions.* Each exchange of correspondence I have discussed at length with Mr. Kiracofe and we have just completed the changes we want made in ABC's latest acceptance letter of our order. Thus, I believe that the matter should be wound up very shortly.
>
> ABC New York is sending a currently cleared list of 96 stations to us. In addition, *with regard to some of the stations which we wanted on our order list* but which ABC had not been able to clear previously, the situation has changed somewhat. It now appears that, through new station facilities in Syracuse and Rochester, New York, ABC will be able to carry the

show in those markets which heretofore we have not been able to get on. Also, new stations are planned in Greensboro, North Carolina, Grand Rapids, Michigan, and Davenport, Iowa, which will make clearance possible. Also, clearance in Buffalo, New York, Raleigh, North Carolina, and Milwaukee, Wisconsin, is now considered possible by ABC. We have been informed by ABC New York that, although it was not able to obtain a 6:00 p.m. time in Chicago, it has been successful in changing the Chicago time for the show from 5:30 to 5:45 p.m.

Thus, of our branch office cities, it appears that Columbus, Ohio, still remains to be a problem. In addition, the clearance situation is not good in Cleveland, Ohio, Miami, Florida, Charlotte, North Carolina, and Providence, Rhode Island." (Def. Exh. K.) (Emphasis added.)

No mention is made that Kemper has been compelled, as one of the "conditions", to take unwanted stations. Moreover, the memorandum clearly indicates that "back and forth discussions" have continued through most of June and are only now "just about finished".

At the bottom of the memorandum is a notation in Mr. DeMark's handwriting "Re: See me. Mr. K. queried me on price. My answer 660-675 depend on clearance. Also told JSK about Miami and other" [18] (T. 183.) Thereafter, on July 3, Mr. Trude sent Mr. DeMark a document entitled "ABC EVENING REPORT TERMS OF AGREEMENT", in which Mr. Trude, according to his covering letter, had "tried to incorporate all of the order letters, acceptance

[18] Buffalo and Miami ultimately cleared. (T. 89.)

telegrams, and verbal conver. ations between [Mr. DeMark] and ABC." (Def. Exh. L.) The attached document, in referring to the time charges for the stations on the ordered station lineup, stated that with respect to Groups I and III they were "based on the June ABC rate card and are based upon forty (40) per cent of the applicable gross hourly rate, less a special 42.5 per cent discount in lieu of all other discounts." The same was true with respect to Group II except that the special discount was "fifty (50) per cent". (Def. Exh. L, Agreement at 2.) On July 13, 1962, another memorandum was sent to Mr. Kemper by Mr. DeMark, reading as follows:

"ABC-TV EVENING REPORT
EXECUTIVE COMMITTEE
EXPENDITURE APPROVAL

Per our discussions and correspondence, *you approved the purchase of the ABC-Evening Report program on a sole sponsorship basis for one night per week for 26 weeks and we have gone ahead with the purchase and preparation of material on that basis.*

However, I understand from Mr. Mark Kemper that the Executive Committee has not approved the expenditure for this program and I wondered whether this should be done.

The expenditure will range from *$666,000 to $684,000 depending on the number of stations which have cleared and will probably clear the show.*

On the basis of your approval, merchandising material is in the preparatory stage and we have made plans to announce the purchase to our own staff early in

August and to the agency force by mid-August." (Def. Exh. M.) (Emphasis added.)

On July 17, 1962, Mr. Donal L. Flynn, assistant general sales attorney for ABC, sent a letter to Mr. Trude, enclosing a form of agreement letter between ABC and the Frank Agency which was characterized as "the result of extended negotiations between our [ABC's] Chicago office and your agency and we believe represents the entire understanding between us." (Def. Exh. N at 1.) The enclosed form of agreement letter bears numerous notations by Mr. DeMark (T. 188), none of which relates to the ordered station lineup. The time charges and special discounts remained the same as those set forth in the "ABC EVENING REPORT TERMS OF AGREEMENT" sent by Mr. Trude to Mr. DeMark on July 3, and already referred to herein. (Def. Exh. L, Agreement at 2.) However, in the paragraphs referring to the time charges and special discounts, while the Terms of Agreement had referred to "the June ABC rate card" the agreement enclosed in ABC's letter of July 17, 1962 to Mr. Trude referred to "the applicable ABC rate card." (Def. Exh. N, Agreement at 1, 2.) Mr. Trude sent the latest proposed agreement to Mr. DeMark by letter dated July 20, 1962, and noted that it followed "very closely the Terms of Agreement I sent you on July 3" with certain exceptions, one of which was that "Instead of showing the June rate card, they have put in applicable ABC rate card which means the same thing. *The contracts always spell out the applicable rate card date.*" (Emphasis added.) Mr. Trude further noted: "I think this now agrees with everything we have discussed over the past two months . . . ." (Def. Exh. O at 1, 2.) Mr. Trude's letter to Mr. DeMark of July 20, 1962 bears

the unidentified handwritten notation: "Hold Exec. Comm. Mtg. 7/24/62" and other notations by Mr. DeMark. (T. 189-90.) On July 24, 1962, Kemper's Executive Committee unanimously authorized "The expenditure of between $666,000 and $684,000 for the purchase of the ABC-TV Evening Report program on a sole sponsorship basis for one night per week for 26 weeks, alternating between Wednesday and Friday nights. . . ." (Def. Exh. P.) Three days later, on July 27, Mr. Flanagin sent an interoffice memorandum to Mr. Kemper, reading in part as follows:

> "At the time the Executive Committee approved the purchase of ABC-TV Evening Report Mr. H. G. Kemper [Mr. James Kemper's brother (T. 196)] *mentioned some real reservations about the show and I know that you already had expressed some reservations.* I also lack some enthusiasm about tne show in part because *news shows do not have the same merchandising qualities that our golf show had* and also because of the time spot this particular show has in Chicago. I do nevertheless feel that the show represents a good sound dollar value for us within a budget which by present day TV standards is very limited. I called Clint Frank [of the Frank Agency] the next day and told him that I thought he should know that while the Executive Committee had approved the purchase *there was a lack of enthusiasm among members of the committee about the show.* Incidentally, the Frank people feel that we have gone so far in the negotiations that even though no contract has been signed *we have legally made a commitment.*
>
> Clint Frank and his fellows again reviewed the thinking behind the purchase of the show and I attach a

copy of his letter to me of July 26 outlining the basic reasons why the agency feels this purchase is a sound one." (Def. Exh. Q.) (Emphasis added.)

The letter from Clint Frank, dated July 26, 1962, and referred to in Mr. Flanagin's memorandum to Mr. Kemper of July 27, was apparently in response to a telephone conversation between Clint Frank and Mr. Flanagin on the previous day when Mr. Frank learned of the Executive Committee's "lack of enthusiasm for the show" at the time they authorized its purchase by Kemper. (Def. Exh. D at 1, 2.) The letter referred to the Frank Agency's original recommendation "based on the fact that this show could be expected to deliver a considerably larger number of advertising impressions for the dollars available than any other offered by any of the three networks within reach of our budget", and "that *consumer impressions were of more importance than merchandising impact in view of our prime objective of raising the level of awareness of Kemper Insurance.*" (Def. Exh. D at 1.) (Emphasis added.)

Five advantages of the program were listed as were three "drawbacks". The five advantages were:

"1) This program offers *excellent advertising continuity* since you will be the sole sponsor one night per week on an every week basis for 26 consecutive weeks.

2) *The audience* for this program *has shown steady growth* throughout the past year and is now averaging near three million homes per telecast with a large share of male viewers—our prime casualty insurance prospects. There is every reason to believe that the program will be doing even better than this by the time our sponsorship starts in mid-October.

3) ABC Evening Report fulfills our need better than any other available television program by giving us *a maximum number of commercial positions.* As you know, your companies have a wide variety of insurance lines and services to be advertised. To do this job effectively *we require many commercial positions.* The Evening Report with 2½ minutes per program in three commercial positions will give us a total of 65 commercial minutes over the 26-week schedule. Only 42 minutes would be available to us over 12 weeks had we used approximately these same funds to purchase the remaining six alternate weeks of All Star Golf.

4) *The price we were able to obtain through extensive negotiations with ABC makes Evening Report an excellent advertising value.* At a maximum cost of $682,000 (based on clearance of the full ordered line-up) we will be paying only $10,500 per commercial minute. All Star Golf costs $15,000 per minute at the price originally offered by NBC. With the discounts offered more recently, All Star Golf minutes average out at about $14,000 a minute.

5) *We certainly plan to obtain as much merchandising value out of your sponsorship of Evening Report as possible.*

   We have already worked out a plan with ABC for a regular newsletter to go out to your agent force over Jim Hagerty's personal signature which would give the agents a top reporter's insight into the news behind the news and provide them with some interesting inside highlights on the news which they could use with policyholders and prospects.

ABC has agreed to prepare this letter on either a monthly or a bi-weekly basis according to your needs.

In addition, as you know, arrangements have already been made for Jim Hagerty to come to Chicago and personally address your Anniversary Contest winners at your meeting here in September.

These are only the beginning. Other merchandising ideas will be worked out to help make this program successful. Possibly Hagerty could be made available for your agent meetings next Spring. He has promised further help to make this program successful." (Def. Exh. D at 2-3.) (Emphasis added.)

The "drawbacks" were:

"1) *It does not offer the opportunity* for some of your agents and policyholders *to attend and participate in actual programs* as did All Star Golf. But then this was a unique feature of the golf show.

2) *A straight news program does not lend itself to the kind of promotional gimmicks and premiums* you have been able to utilize to some extent with the golf show such as golf balls, playing tip booklets, score cards, etc. However, we believe our other merchandising plans can make up for at least a part of this loss.

3) *The Chicago time period for the program is not ideal.* However, through our efforts, arrangements have been made to move the program fifteen minutes later to 5:45 p.m. here by the time we start in the Fall which will certainly be an improvement. An interesting sidelight to this is that even in its present 5:30 p.m. position ratings indicate the Chi-

cago audience has been averaging above the national level."

In conclusion, Mr. Frank noted:

"*In summary, Norrie, after an honest and openminded reevaluation of the pros and cons, we believe this program will give you more of the things you need within the limits of your budget than any other available to us;* a large audience per dollar expended; a broad audience of adult males; an excellent atmosphere for a wide range of commercials; a prestige program; and above all, excellent continuity of commercial impressions." (Def. Exh. D at 3, 4.) (Emphasis added.)

No reference whatever was made to the fact that the program would be carried over stations that Kemper did not want, even though the letter was apparently based on a review of the Frank Agency's recommendation and its subsequent negotiations with ABC. Only the unfavorable time for the program in Chicago was mentioned insofar as the station lineup is concerned.

The ultimate contract, dated August 15, 1962 (Def. Exh. C), provided for Kemper's sponsorship of "Evening Report" one day per week during a 26-week period commencing October 17, 1962 over an ordered station lineup attached to and forming a part of the contract.

Kemper was given "the right to accept or reject any additional stations to the lineup shown on the attached ordered station lineup." (Def. Exh. C at 2.) As was the case in all the drafts or proposals including and subsequent to the order letter of June 5, the final contract provided that Kemper "shall have sole sponsorship . . . on the days of their sponsorship" (*id.* at 1), which was

to alternate on a 1-day-a-week basis on Wednesday and Friday. The provision for the $17,750.00 maximum was removed and the lineup was divided into three groups of specifically named and identified stations. However, although the $17,750.00 maximum was removed, it should be remembered that Mr. Trude, in his letter to Mr. DeMark of June 25, 1962, pointed out that a 42½ per cent discount "will bring us in at the exact figure of $17,750.00." (Def. Exh. J at 1.) For Groups I and III a special discount of 42½ per cent, and for Group II a special 50 per cent discount were fixed, based in each case on 40 per cent of the applicable hourly rate in the June 5 rate book. Group I consisted of 102 stations, of which 67 were originally "ordered" by Kemper in its letter of May 4, all but 3 of the remaining 35 being stations which Kemper had indicated it did not want in that letter. Group III, for which, as noted, the 42½ per cent special discount also applied, consisted of the 13 stations, specifically named and identified, which were not clearing the program at contract time but which Kemper wanted although it was unlikely they would clear prior to the commencement of the program. Group II, with respect to which a special discount of 50 per cent was fixed, consisted of 15 stations specifically named and identified, most of which were not clearing the program at the time the contract was signed but which Kemper desired and with respect to which there was a reasonable likelihood of clearance. Of these 15, there were 5 which were "key markets" of Kemper, 2 of which had cleared, *i.e.*, Buffalo, New York, and Miami, Florida. The program cost of $5,000.00 and network charge of $500 were maintained and the time charges hereinbefore referred to were all subject to agency commission.

Whether or not Kemper still did not want certain of the stations in Group I, or whether in consideration of other concessions, the inclusion of such stations was no longer a matter of concern to it, while pertinent to the issue of legality, is not necessarily determinative of the issue herein which predates by nearly three months the execution of the contract sued on.

And thus we come to the sole issue for determination, *i.e.*, "whether it was reasonable for [Kemper] not to have attempted to negotiate further." While the Court of Appeals, in propounding the issue, did not specify any particular date after which Kemper should or should not have attempted to negotiate further, with respect to the unwanted stations, plaintiffs' attorney has indicated that the crucial date is May 10, 1962.[19] However, I would not wish to limit Kemper to this date, particularly since the matter of the "unwanted" stations was a subject of conversation at the meeting of May 18. Wednesday, May 23, would appear to be a more reasonable date, especially since Mr. Kemper agreed to go ahead with the purchase on that date. The Court received, over plaintiffs' objection,[20] evidence of all that transpired up to the signing of the allegedly illegal agreement, since it is the ultimate contract of August 15, 1962 that is attacked and all transactions, including abortive negotiations which broke down before the contract was arrived at, must be considered as

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[19] "Whether it was reasonable to require Kemper to negotiate after ABC rejected its offer. The offer was rejected on May 10th, and the question is what happened after May 10th." (Hearing in Chambers on November 12, 1968 at 6.)

[20] Plaintiff has constantly contended that any evidence relating to the period after June 1 or June 5, 1962 was irrelevant and immaterial. (T. 95.)

corroborative or non-corroborative of the claim of illegality asserted herein.

In an attempt to determine the issue propounded, the Court has carefully and repeatedly reviewed all of the testimony and exhibits that have been received with respect thereto. The Court has accorded great weight to the documentary evidence referred to herein as reflecting the course of the negotiations more accurately than the recollection of witnesses some years later.

One further observation is necessary. The phrase "an ordered station lineup" is susceptible of different interpretations, *i.e.*, it can describe the form of the order or the content of that order. Likewise, "unwanted stations" and the blackout of such stations can involve stations either presently part of a then-going lineup or it can also involve stations which are subsequently cleared but which are not wanted by a sponsor although they form part of a then-going lineup. Where the testimony does not establish the particular interpretation of the phrase intended by the witness, the Court has resorted to the documentary evidence for such assistance as may be contained therein. One of the problems that has emerged is that the propounded issue may never actually have been an issue in the case, the real issue being *why* did Kemper not negotiate further regarding the "unwanted" stations. The Court has attempted an over-view of the negotiations involving a consideration of the individuals involved, the strength and weakness of the parties at the bargaining table, the relevant economic factors, the primary objectives, and the results obtained. For it is only in this way that the reasonableness of any decision in the course of the negotiations can be determined.

First, the principal individuals involved and their involvement. In point of time, Mr. Gunn and Mr. Scherick, on

January 25, 1962, lay the basis for all that is to follow. Mr. Gunn is senior vice president and director of broadcasting services for the Frank Agency, which Agency handles the Kemper account. His job is finding the appropriate program for the client, after which Mr. Trude, the Agency's vice president and director of media, has the duty to take over the negotiations. The latter does not normally report to Mr. Gunn, however, as they are each in charge of separate departments. (T. 35, 58.) Mr. Trude is well experienced in the negotiation and purchase of television programs and has been with the Frank Agency almost three and one-half years at this time. (T. 33, 70.) Mr. Scherick is the vice president in charge of network sales for ABC and it is he who fixes or approves the price of television advertising. (T. 255-56, 269, 293.) Mr. Scherick is located in New York. Mr. Gunn, who is located in Chicago, comes to New York on January 25, 1962, to discuss possible sponsorship by Kemper of "Evening Report". Mr. Gunn already knows something about this program, having already discussed it with a Mr. Lang at ABC, and having received a list of the station lineup some time in 1961. Mr. Scherick makes the offer of $22,000 per segment for 52 segments if the Frank Agency can interest Kemper in sponsoring 2 segments a week. No commitment is made but Mr. Gunn states that he will report the offer to Kemper. Except for confirming the offer in his telegram of March 26 to Mr. Gillogly, Mr. Scherick's direct participation in any negotiations ends with the original meeting with Mr. Gunn in January, and other than the initial conversation with Mr. Gunn, Mr. Scherick has no further conversations with Mr. Gunn or with representatives of either the Frank Agency or Kemper. (T. 338, 343-44, 360.) The matter becomes a Chicago matter, and that office will

handle the ABC negotiations with Kemper "almost entirely except for a few phone calls". (T. 316.)

And so we next hear from Mr. Beebe of ABC in Chicago, who is a TV account executive and the salesman for "Evening Report" and writes a sales letter to Mr. Gunn on March 23 asking for an opportunity to put on "a full scale presentation" to show what the program could do for Kemper. In the meantime, and on the same day, Mr. Gillogly, vice president in charge of television sales in ABC's Chicago office, sends a memo to Mr. Scherick in New York to get a confirmation of Mr. Scherick's original offer to Mr. Gunn of 52 segments since, according to Mr. Gillogly, Mr. Gunn "is actually going with" the $22,000.00 figure. Mr. Gillogly, in Chicago, is accustomed to reporting directly to Mr. Scherick in New York. (T. 339.) So now we find Mr. Gillogly and Mr. Beebe handling the matter for ABC in Chicago and still dealing primarily with Mr. Gunn of the Frank Agency in that city. Mr. Beebe is still seeking "to finalize the deal" and again writes to Mr. Gunn on March 28 offering "to prepare a booklet or a full scale presentation" and suggesting the possible use of Mr. Hagerty's services, the latter's job with ABC being to promote their news program. (T. 360.) Indeed, "Evening Report" is the second of Mr. Hagerty's "major news contributions to ABC-TV and the public since becoming that network's Vice-President in charge of News and Public Affairs." (Def. Exh. A at 1.) Mr. Gunn receives a station lineup from ABC which he tells his secretary to forward to Mr. DeMark, the latter being the first representative of Kemper to enter the picture. It is Mr. DeMark who is to be in charge of negotiating the purchase of "Evening Report" so far as Kemper is concerned. (T. 129A.) Mr. DeMark, the advertising manager of Kemper,

is accustomed to report directly to Mr. Flanigan, one of the top executives of Kemper, and by memoranda to Mr. Kemper, usually with copies to Mr. Flanagin. (T. 184.) Mr. Kemper, of course, is the "ultimate authority" for entering into any contract on behalf of Kemper. (T. 176.) A meeting has been scheduled for April 17 at Kemper for the "sale" of the program and, as suggested by Mr. Beebe in his letter to Mr. Gunn of March 28, 1962, a "booklet" has been prepared, in this case by Mr. Gunn himself—the so-called "Silver Report". Mr. DeMark, in the meantime, has examined the station list he has received from Mr. Gunn and has advised Mr. Gunn's secretary of some 20 stations "taken off the top of [his] head" which Kemper does not want, and these are duly indicated by asterisk on the station lineup attached to the Silver Report. When Mr. Gunn of the Frank Agency and Mr. Gillogly of ABC go to Kemper on April 17, they are each aware that Kemper has indicated there are some stations it does not want, but they resolve to "sell the program", and worry about the unwanted stations later. Little, if anything, is said about the unwanted stations at the meeting at Kemper with Mr. Flanigan—Mr. DeMark does not consider these stations a major concern and therefore does not mention them in his memorandum to Mr. Kemper the following day, nor does Mr. Kemper in his letter to Mr. Hagerty one week later. The principal problems are the "additional stations", the 15 pending and the 13 non-clear stations listed in the Silver Report, and the time period for the Chicago station. Both of these problems are mentioned in the memorandum to Mr. Kemper, and in Mr. Kemper's letter to Mr. Hagerty. The April 18 memorandum from Mr. DeMark to Mr. Kemper is quite significant. It recommends the purchase of 39 segments contingent on a list of "must" stations and

a change of time in Chicago, with the right to cut back to 26 segments at a cost of $24,000 per segment plus the cost of the additional stations at the same discount. It notes that the cost of the 39 segments with the additional stations will be "approximately" $950,000 to $975,000, which must mean $25,000 per segment if all the additional stations are cleared, as against $22,000 per segment for the cleared lineup specified in the Silver Report—a difference of $3,000 to cover the additional stations.[21] No deduction is made from either the $22,000, the $24,000 or the $25,000 figures to reflect any unwanted stations. Nor is any substantiation given for the $3,000 figure for additional stations, unless Miss Crisafulli made her computations before the record indicates. However, since the additional stations were a principal topic of discussion on April 17, a cost figure may well have been mentioned.

If Mr. Kemper approves giving an order on the foregoing basis, Mr. DeMark requests that he write Mr. Hagerty, which he does on April 25, although when Mr. DeMark talks with Mr. Kemper on the phone on April 23, the latter's first reaction is to order only 26 segments. On the same date, *i.e.*, April 25, and after speaking with Mr. Gunn on the phone, Mr. Gillogly telegraphs ABC in New York that ABC has a verbal order from the Frank Agency for 39 segments.

A meeting is scheduled for April 27 at the Frank Agency to work out the details, at which meeting ABC is repre-

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[21] No authority is given for the $3,000 figure to cover the additional stations implicit in the cost figures given. Miss Crisafulli, according to the records, did not complete her computations until April 27, and not prior to April 17. However, since the additional stations were a principal topic of discussion on April 17, it seems reasonable to suggest that the $3,000 figure was first mentioned on April 17 rather than on April 27, and that Mr. Gillogly was mistaken in his dates. (T. 382-83.)

sented by Mr. Gillogly and by Mr. Nordmark. Kemper is represented by Mr. DeMark, and the Frank Agency by Mr. Gunn and possibly by Mr. Trude. Mr. Nordmark is ABC sales service manager in Chicago, and his presence, rather than Mr. Beebe's, is significant, for his "primary responsibility was to work out the details of the verbal order." (T. 410.) Mr. Trude, who heads a different department, as has been noted, will take over from Mr. Gunn after the program has been selected. His presence at the meeting on April 27 is a matter of dispute.[22] According to Mr. DeMark and Mr. Gunn, the matter of the unwanted stations is again raised, but according to Mr. Gillogly the additional markets again are the prime concern. Mr. Nordmark recalls that Mr. Gillogly "raised the question of additional Kemper markets and began negotiating on that". (T. 453.) Apparently, Mr. DeMark sends no memorandum to Mr. Kemper regarding this particular meeting. Mr. Trude, however, on instructions from Mr. DeMark, and in possession of the Silver Report, the ABC rate card, and Miss Crisafulli's computations, prepares an "order" letter addressed not to Mr. Gillogly but to Mr. Beebe, with a covering letter from Mr. Gunn to Mr. Beebe. There is no dispute that Mr. Beebe was not at the April 27 meeting and Mr. Trude claims that he also was absent. Moreover, there is some evidence that Mr. Gunn, who sent the covering letter, is surprised by the terms of the enclosure. (Def. Supp. Exh. GG, Deposition of Mr. Beebe at 30.) It seems clear that much of the contents must have been the work of Mr. DeMark. However, Mr. DeMark, who apparently has sent a memorandum to Mr. Kemper regarding the meeting of April 27 "to work out the details", sends no

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[22] See note 15, *supra*.

memorandum to Mr. Kemper regarding the order which Mr. DeMark has authorized.

There can be little question that the May 4 letter represented a radical departure from ABC's offer. Regardless of the discussions that may have taken place over the period from January through April 27, it seems clear that ABC's offer was of the "then going lineup"—*i.e.*, the stations carrying the program at the time of any particular broadcast and that the $3,000.00 figure was set in conjunction with that offer and encompassed the 15 pending stations listed in the Silver Report and not the 13 non-clear stations also listed therein for which no charge was to be made. Kemper has attempted to treat the offer of these additional stations and the package price for them as unrelated to the "then-going lineup" although it is clear that the offer was made in connection with that lineup. The May 4 letter: (a) ordered an "Ordered Station Lineup" of 95 stations at a time charge "package rate" *not to exceed* $18,750 per segment for 39 segments, rather than the "then-going lineup", currently of 99 stations; (b) *eliminated 32 stations* of the "then-going lineup" and *added 28 stations* not then clearing, including the 15 non-clearing stations for which the $3,000.00 price had been set; (c) *specified 41 "key markets"* that it was "imperative" that ABC clear, of which 12 were not then clear,[23] and of which 12 at least 5 were in the group for which clearance was doubtful—the order also being contingent upon clearance between 6:00 and 7:00 local time "unless our client elects otherwise"; (d) gave Kemper the *right to accept or reject additional stations* at the "package rate"; (e) stipulated that if ABC could

[23] Since Binghamton, N.Y., was listed as cleared in the Silver Report, the correct figure of those not cleared may have been 11.

not clear the "key markets" by June 1 (rather than 30 days from the contract date) and obtain the requested 6:00 P.M. or 5:45 P.M. time for the Chicago station, the order would revert to 26 segments unless Kemper elected to accept the 39 segments, the time charge for the 26 segments not to exceed $20,750 per segment; (f) gave Kemper the *right to cancel* after 13 weeks on 45 days' notice, and (g) stipulated that the $18,750 or $20,750 *time charge "shall be reduced by the package rate of any station not clearing* or not carrying the program by reason of pre-emption or other reasons." This final stipulation is an interesting one, particularly when one examines the computations by Miss Crisafulli that Mr. Trude had when he prepared the letter. The Court is not impressed with Mr. Trude's testimony (T. 41) that the "reduction" did not apply to the 13 non-clear stations since the language of the letter is clearly to the contrary and no breakdown is made to show that these stations were included at no charge. When Mr. Trude wanted to make such credit or deduction clear he was fully capable of doing so. (Pltf. Exh. 8.) No distinction is made between stations whose clearance was then pending, *i.e.*, the 15 stations for which the $3,000 figure had been quoted and the 13 non-clear and doubtful stations. Of the 13 non-clear stations 5 were "key market" stations with respect to which a failure to clear would permit Kemper to reduce the order to 26 segments. Miss Crisafulli had valued these at the package rate at $1,218.00. The remaining 8 she had valued at $1,204.88. (Def. Supp. Exh. FF at 1.) In short, Kemper had provided for credit for 13 non-clearing stations having a package rate value of $2,422.88 per segment, which stations ABC was offering free in conjunction with the 15 stations which were offered at $3,000.00 and which Miss Crisafulli had valued at $3,-

166.00. If only the 15 pending stations cleared, Kemper would be entitled to a credit of $2,422.88 on the 13 not clearing, so that the *total cost to Kemper of the 15 pending stations would in effect be $577.12 per segment,* and the total time-charge would be $16,327.12 rather than $18,750.00 per segment. Plaintiff argues (Pltf. Post-Trial Brief-Exh. A) that the unwanted stations had a "package rate" value of $2,187.00 per segment. Accepting this figure as valid, Kemper was attempting to obtain a credit to which it was not entitled which was in excess of the value of the stations it allegedly did not want. Moreover, since all "key markets" would not have cleared, Kemper could reduce its order to 26 segments at $18,327.12 rather than $20,750.00 per segment. Not only was Kemper materially changing the number and character of the lineup offered by ABC—it was in effect substantially lowering the price for that lineup. Furthermore, its order encompassed all the stations as a group, no separate figures being quoted for the 67 stations which had cleared, and the 28 which had not. As a matter of fact, Kemper *never* submitted a separate order for these stations alone.

When the May 4 letter is received,[24] Mr. Beebe shows it to Mr. Nordmark and calls Mr. Gunn. Mr. Nordmark discusses the letter with Mr. Gillogly and Mr. Beebe, and calls Mr. Trude. It is at this time that ABC breaks down the original $22,000 figure into other than the $15,000 and $7,000 time and program charges initially mentioned by Mr. Scherick. Mr. Nordmark makes various notations on the letter which have been previously referred to herein. (Def. Exh. Z.) In addition to the matter of the lineup, Mr. Nordmark notes certain disputed items, *e.g.,* (a) the

[24] Since May 4 was a Friday, the May 11 deadline set by Kemper, which the latter refused to extend, seems unnecessarily restrictive.

program schedule 6:00-7:30 P.M., *not* 6:00-7:00 P.M.; (b) the "RIGHT TO ACCEPT OR REJECT ADDITIONAL STATIONS" was "NOT AGREED OR DISCUSSED BUT WILL NEGOTIATE ON MKTS WHERE KEMPER HAS NO AGENT"; (c) agreement not to accept as co-sponsors companies in certain types of business—"NO! NOT AGREED OR DISCUSSED BUT—MR. KEMPER VERY STRONG ON THIS. CAN NEGOTIATE WITH AGENCY ON THIS."; (d) network preemption protection —"NOT AGREED OR DISCUSSED ABC POLICY WILL APPLY", and (e) a cancellation clause—"NO! NOT AGREED OR DISCUSSED." With respect to the lineup, while Mr. Nordmark's notes indicate adherence to the "then going lineup" of 99 stations, they also indicate a willingness to negotiate not only as to additional stations, but also stations in the "then-going lineup" in which localities Kemper has no present agent-representation.

A copy of the May 4 letter goes to ABC in New York and is received by Mr. Hede, a vice president and administrative sales manager who normally reports to Mr. Scherick. (T. 256, 269.) Accordingly, Mr. Hede checks with Mr. Scherick. Mr. Scherick's active participation in the sale negotiations has terminated with his confirmation telegram to Mr. Gillogly in March but he tells Mr. Hede that if Kemper wants to select[25] its own stations they will have to go "rate card", which Mr. Hede passes on to Mr. Nordmark. In the meantime, any extension of time to respond having been refused, ABC prepares a letter to Mr.

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[25] In so far as a "selected" lineup is involved herein, it is necessary to distinguish between a multi-sponsored program and one involving only a relatively few sponsors. Although Kemper did not buy the full lineup for All-Star Golf or for Chet Huntley Reporting, there was only *one* co-sponsor in each instance. (T. 129.) By June 1962, there were five sponsors of Evening Report. (Def. Exh. U.)

Trude, with copy to Mr. Gunn, dated May 10, 1962 and signed by its general sales attorney. Mr. Trude forwards it on to Mr. DeMark on the following Monday, May 14, characterizing it as "ABC's so-called acceptance letter" and stating that he will call Mr. DeMark later that day to discuss it. On the same day, Mr. Nordmark goes to see Mr. Hede in New York to confirm ABC's position.

While the terms of the May 10 letter (Pltf. Exh. 7) have already been discussed, certain provisions require comment, particularly in the light of the extensive notes which Mr. DeMark makes on the copy which he receives from Mr. Trude. As to the program schedule, no objection is noted to the 6:00 P.M.-7:30 P.M. period rather than the 6:00 P.M.-7:00 P.M. period ordered in the May 4 letter, but the notation "local times" appears in lieu of (PM CNYT). Although the May 10 letter specifies that the "station lineup will consist of the then going lineup of ABC basic affiliated stations carrying the program as of each telecast of which you are a sponsor", *Mr. DeMark's noted concern is not with stations in that lineup which Kemper does not want but with a loss of stations from that lineup*—"What happens if a lot of Stat. drop between 6/1 & 10/15"—and he is concerned with a loss of "video but not Audio" or "vice versa" and with partial interruptions—"What protection if City now carrying drops". No comment whatever is noted with respect to the listing of the 15 additional stations to be ordered at $3,000 or the 13 additional stations at no extra charge, nor to the failure to include the latter among the stations for which credit is to be given for non-clearance. What concerns Mr. DeMark is the possibility that stations presently in the lineup may drop out and that Kemper, in that event, will receive no credit against the time-charges, and he

mentions specifically New York, Chicago and Washington. Also he notes additional undesirable co-sponsor products, a "Morals clause?", a "Cancellation clause?", "Chicago time charge" and, without reference to any provisions in the letter, "station-lineup."

In the meantime, a meeting is arranged at the Frank Agency office in Chicago for May 18th. Mention has already been made of those who attended that meeting and the general topics of discussion. There seems little question that the lineup was discussed in terms of stations which Kemper was anxious to have included as well as stations in which it was not interested. Also, it is not disputed that "blacking out" Kemper commercials on the unwanted stations, as well as a cancellation clause, was discussed. However, no one at this meeting told Mr. Trude he would have to pay rate card or go back to New York to renegotiate the contract. Although much emphasis has been focused by Kemper at trial on the "unwanted" stations, the fact is that Kemper's primary concern was with the stations that ABC had not yet cleared—the Kemper "key markets"—and Kemper was now prepared to take the stations in the *then* going lineup in the form of a *specific ordered station lineup* if they could also get the additional key markets they wanted at substantially the same discount and could also have a cancellation clause.

Although Mr. Trude, in his testimony, denied that he and Kemper's representative had decided to take ABC's original offer at the meeting of May 18 (T. 102), he also testified that what ABC agreed to do was go back to New York after the May 18 meeting and "ask . . . could we black out *or* have markets that we *specifically* wanted" (T. 49) (emphasis added)—"could we have a particular

station lineup *or* could we blackout markets." (T. 52.) (Emphasis added.) In other words, could they have a specific ordered lineup made up of the then-going lineup plus the 28 additional stations which included certain key markets *or* could they blackout stations in a then-going lineup including stations presently or thereafter in the lineup which they did not desire. Accordingly, Mr. Trude, during the last week in May, prepares a draft of a proposed order letter which, although it mentions a "then-going lineup" limited to the stations presently cleared unless Kemper elected otherwise (Def. Exh. H at 2), has an Ordered Station Lineup attached which includes the then-going lineup plus the 28 additional stations. Furthermore, although Mr. Trude, in explaining his reasons for not negotiating further, indicated that he reached this conclusion after Mr. Nordmark told him he could have the ordered lineup only at rate card (T. 113, 116), he admitted that by the time he received that information he had already commenced preparation of the June 1 draft (T. 54) and at a time when Mr. Kemper had already decided on sole sponsorship. It seems more likely that his reasons for not negotiating further were reasons which were apparent to him at the meeting on May 18. "First of all, . . . we wanted a specific lineup" (T. 116)—"Secondly, as far as I was concerned, the rate structure that we had given was basically the same amount of money to the network as I had previously seen in the Silver Book, and so forth, as far as all we wanted were 67 stations at the same rate they were going to give us 99, I believe the figure was, and we agreed on their terms to 15 additional at $3,000 and 15 or 13 other markets at no cost." (T. 116-17.)

While consideration is given to blacking out the unwanted stations, Kemper never attempts to ascertain what the costs involved would be or whether they would be exorbitant as claimed by ABC.[26] When Mr. Kemper is informed on May 23 that there can be no cancellation clause, the order is reduced from 36 segments to 26 segments at which times Kemper will be on *by itself* (Def. Exh. G), *i.e.*, there will be no blackout of Kemper on certain stations which would permit other advertisers to sponsor on the blacked-out stations. The products of possible co-sponsors and not "pushing" the program to specific advertisers are discussed at the May 18 meeting, obviously in connection with any "blackout". Significantly, once agreement is reached that Kemper shall have sole sponsorship on the particular days involved, the proposed agreements no longer prohibit acceptance by ABC of co-sponsors in a line of business unacceptable to Kemper. (*E.g.*, Def. Exhs. Z and L.) Although ABC has agreed at the May 18 meeting that it will "go back to New York with regard to [the] cancellation clause and the stipulation that [Kemper] take all the stations on [ABC's] line", Mr. DeMark seeks the earliest possible date to discuss matters with Mr. Kemper, and a decision is reached to go ahead on a 26-segment basis "by ourselves" after Mr. DeMark has learned that no cancellation clause will be permitted (Def. Exh. G), but, as already noted, before he has ever learned that Kemper would have to pay "rate card" for a selected lineup. One might ask why Mr. DeMark did not wait until he learned of ABC's decision with respect to a "rate card" charge for a selected lineup. It seems clear that the

[26] Significantly, Mr. Trude never referred the matter of a blackout back to New York prior to May 18, although he did refer the question of the lineup and of a cancellation clause. (T. 123-24.)

problem of the "unwanted" stations presently clearing the then-going lineup was no longer a problem since Kemper had decided to go along on this. The question to be resolved was whether the then-going lineup would be limited to exclude future additional stations unacceptable to Kemper or whether there would be an ordered station lineup which would, by its very nature, exclude future unwanted stations It is significant that the next documents in order of time provide for such a limited then-going lineup.

After Mr. DeMark's meeting of May 23 with Mr. Kemper, Mr. Trude proceeds to draft a new order letter "due to the failure of ABC to accept the provisions of [the] original letter [of May 4]".

The terms of the draft of June 1 and the order letter of June 5 have already been discussed herein. (Def. Exh. H; Pltf. Exh. 8.) However, certain features require further comment. Like the May 4 order letter, and unlike the May 10 letter, the latest documents contain an ordered station lineup remarkably similar in form and content to the "Evening Report Station Lineup" forming part of the Silver Report. While the term "then-going lineup" is used, in effect a specific lineup is ordered, since Kemper is not obliged to accept additional stations not then forming a part of the lineup. Furthermore, unlike the May 4 letter, but in conformity with the May 10 letter, the latest documents specify a $3,000 time charge for the 15 stations identified in the Silver Report as pending, with no charge for the 13 non-clear markets also listed in that report, and, unlike the May 4 letter, it is clearly stated that no credit shall be given for failure to clear the 13 non-clear markets.

No mention of "rate card" is made in either the May 4, May 10, or June 5 order letters. However, in ABC's acceptance telegram of June 12 (Def. Exh. I), it requested that the charge for the stations in Group I (the then-going lineup) "be in accordance with ABC's applicable *rate card* rate" (emphasis added) subject to a 38 per cent time discount but not to exceed $17,750.00 and that the charge for the stations in Group II (the 15 additional markets) "be in accordance with ABC's applicable *rate card*", (emphasis added) subject to a time discount of 45 per cent but not to exceed $3,000.00. It is interesting to note that ABC's offering sheet issued the following day makes no provision for any special discounts such as those granted to Kemper. The fact that "rate card" now appears in these negotiated documents does not appear to perturb Mr. Trude who writes Mr. DeMark on June 25, 1962 to advise him that the 38 per cent discount on Group I has been raised to 42½ per cent to reach an exact figure of $17,750.00, the ceiling figure. Mr. Trude notes that "[t]his means that we will be on a *rate-card basis* less this discount" (emphasis added) and Mr. DeMark responds by noting in the margin *"what we asked for"*. (Def. Exh. J.) (Emphasis added.) Rate card, of course, was never the monstrosity Mr. Trude made it out to be.[27] He admitted Kemper had paid rate card for the "Johnny Carson" and "Today" shows. (T. 74-75.) In a letter to Mr. DeMark on July 20, 1962, in commenting on

[27] While it is possible to imagine various ways of pricing a program, the principal methods would appear to be a "package rate" in which there is no purchase price allocable to any single one of the items comprising the package and a "rate card" or other "unit" price comprising the total charges for the program based on the individual components. Kemper attempted to select the most favorable features of both methods. However, once the package form if not the package rate was rejected some resort to rate card was the only possible alternative.

certain changes in the latest form of agreement, Mr. Trude notes that "[the] contracts always spell out the applicable rate card date."

If "rate card" was not taken in the negotiations herein to mean a base from which to bargain (T. 435), as the Court believes it was, it can only be termed a "ridiculous" or "absurd" proposal by reason of the poor marketability of the program itself, with which proposition the Court is inclined to agree and which will be more fully developed hereinafter. As Mr. Trude said to Mr. Nordmark, "full rate card was absurd *on this program.*" (T. 54.) (Emphasis added.)

By June 28, the parties "were just about finished with . . . [their] back and forth discussions . . . . [Kemper has] submitted two order letters to ABC [May 4 and June 5] replete with conditions and . . . [ABC has], as might be expected, sent . . . [Kemper] acceptance letters [May 10 and June 12] which were just as filled with conditions." (Def. Exh. K.) By July 3, matters have progressed sufficiently for Mr. Trude to send Mr. DeMark a document entitled "ABC Evening Report Terms of Agreement" (Def. Exh. L) which will form the basis for the final instrument, the contract of August 15. Again, the time charges are based on rate card, in this case "the June ABC rate card" but now a rate card rate and discount is set for the 13 doubtful stations in Group III, *i.e.*, a special 42½ per cent discount, the same as for Group I (the restricted "then-going" lineup). Also, the special discount against rate card for Group II, the 15 stations pending, and for which the $3,000 ceiling had been fixed, is raised to 50 per cent. Although the $17,750.00 and $3,000.00 ceilings are not mentioned with respect to Groups I or II, Mr. DeMark notes these ceilings on the copy of the Terms of Agreement. On

July 13, Mr. DeMark again writes Mr. Kemper to remind him of his approval of the purchase on a "sole sponsorship" basis, and tells him of the preparation of materials and the proposed announcement date in August.

On July 17, ABC sends a form of agreement to Mr. Trude which has already been discussed herein, and which Mr. Trude characterizes, in forwarding it to Mr. DeMark on July 20, as following very closely the Terms of Agreement which he forwarded him on July 3. While the Terms of Agreement had been prepared by Mr. Trude, the later document was prepared by ABC. It is in this setting that Kemper's Executive Committee meets on July 24 and "unanimously" authorizes the expenditure of $666,000 to $684,000 for purchase of the program "on the sole sponsorship basis" for 26 segments. However, for the first time in the documentary evidence there appears the suggestion that the program is not such an attractive program as this lawsuit might indicate. Indeed, it appears that there is "a lack of enthusiasm among members of the committee about the show" (Def. Exh. Q) and that the head of the Frank Agency has written Mr. Flanagin two days after the Executive Committee to justify the purchase. (Def. Exh. D.) Whatever the reasons may be for the "lack of enthusiasm", the fact that the lineup included "unwanted stations" was clearly not one of them.[28] The program "offers excellent advertising continuity", the audience "has shown steady growth", the program gives "a maximum number of commercial positions" and the price makes it "an excellent advertising value". What must be recognized, however, is

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[28] There is no evidence that Mr. Kemper, assuming he was aware of the fact that the purchase involved a substantial number of "unwanted" stations, ever communicated such fact to the Committee or that Mr. Flanagin ever did so.

that ABC, in venturing into the news program field, was dealing with a product which was not easy to sell.

Although it might be inappropriate, in the limited framework of the issue involved herein, to consider whether ABC had sufficient economic power to impose an appreciable restraint on free competition in the tied product, it is certainly pertinent to consider the marketability of the program involved in the negotiations and its attractiveness to the particular parties involved. Kemper's insistence on a cancellation clause and its reduction of the order on the refusal thereof is hardly an indication of the program's attractiveness. One searches the record in vain for any indication or expression by Kemper of any enthusiasm for the particular program—in fact, Kemper appears to have relied almost completely on the Frank Agency. It is that Agency which, together with ABC, pushes the program, and it is that Agency which prepares the initial "selling" document, the Silver Report, and attempts to justify the selection after the final authorization by Kemper has been obtained. ABC was "distinctly third" among the three networks in the area of news (T. 266-67, 345.), and the program was extremely difficult to sell. (T. 346.) Mr. Scherick "used to liken it to the situation where somebody introduced a full-sized morning newspaper in New York City with the Herald Tribune and the New York Times already in existence." (T. 346-47.) Mr. Nordmark characterized it as a "turkey". (T. 432.) Mr. DeMark had been told by ABC "that one of their problems was that they were in the position of having to build a news image in face of the competition of the other networks . . . " (T. 142) and that they were having trouble selling the program as late as July of 1962. (T. 192.) Mr. DeMark also knew that the closer you get to air time the more advantageous it is to a

sponsor to get a good deal. Mr. Trude knew back in May that ABC had not sold all the available time, a factor which he would "usually" take into consideration in entering into contracts with a network for time. (T. 79.)

ABC's concern with blacking out stations forming a part of its going lineup is understandable, particularly in light of its difficulties in selling all the available time and its attempt to build a news image. A full lineup "services more of the stations you want to keep. It presents a better advertising value normally. The larger area of the country you cover, the more important the program on the selling point." (T. 308.) While "[t]here are strengths and weaknesses in any network lineups, . . . network lineups are the very foundation of the program's success in terms of its coverage and in terms of its resultant ratings. (T. 370.) Mr. Gillogly explained to Mr. Flanagin in April the difficulty in asking stations not to clear on one or two days of a five-day-a-week program. (T. 372.) What better way to secure compensating concessions from ABC than to ask it to blackout a substantial part of its lineup, particularly in the light of ABC's desire to sell its program?[29]

The negotiations terminate, of course, with the execution of the letter agreement of August 15, 1962. The general terms have already been alluded to, and they will be revisited in discussing what Kemper negotiated for, and what it finally obtained.

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[29] Of course, if Kemper received consideration for its "acceptance" of the "unwanted" stations by way of other concessions by ABC which Kemper considered sufficient for such acceptance, there can have been no "coercion". This is only one of the difficulties inherent in attempting to isolate a portion of a continuing negotiating process to determine what positions taken by the negotiators were reasonable and what were unreasonable.

What, then, were the objectives of each of the parties, and which objectives were the subject of their negotiations? There is no dispute that ABC was anxious to sell its program and to sell it substantially in the form in which it was being offered to other sponsors. It cannot be disputed that ABC was anxious to sell its program over its then-going lineup and that it was at least partially successful in achieving its objective—it sold its program but over a specific ordered station lineup which included stations not in its then-going lineup and excluded certain stations which might become part of its then-going lineup but which Kemper might not desire.

As for Kemper's objectives, the principal consideration was *cost*. As Mr. Trude testified, "[t]he amount we had to pay was *uppermost*" (T. 82) and he had been told by Kemper in May 1962 that it "didn't want to pay anything substantially more than the original package price for the ordered station lineup." (T. 81.) Mr. DeMark testified that Kemper had a general "outside figure" that Kemper could spend, "anywhere from $600,000 to $900,000 depending on the buy". (T. 158-59.) The Frank Agency selected a plan described in the Silver Report that would allow them "to do the best job with the monies available", the cost of which was listed at $858,000. (Def. Exh. A at 3.) In his memo to Mr. Kemper on April 18, Mr. DeMark mentioned figures ranging from $624,000 to $975,000, the latter figure based on the unlikely possibility that the additional stations will clear. (Def. Exh. E.) In his handwritten notes on his memorandum to Mr. Kemper on June 28, 1962, Mr. DeMark noted that he told Mr. Kemper the price would be $660,000 to $675,000 depending on clearance (Def. Exh. K), and on July 13 he informed Mr. Kemper that the "expenditure will range from $666,000 to $684,000" depending on clear-

ance. (Def. Exh. M.) It is these latest figures which the Executive Committee authorized at its meeting on July 24, 1962. (Def. Exh. P.) While the letter of agreement of August 15 did not specify any maximum, according to the Frank Agency the maximum cost would be $682,000, based on clearance of the full ordered lineup. When one considers that according to the testimony only 2 of the 28 "additional stations" cleared, the maximum cost must well have been substantially lower. It seems quite clear, then, that Kemper was able to obtain the sponsorship well within its budget limits.

Next in importance to Kemper was *"an ordered station lineup"* as distinguished from a "then-going lineup" and it is in this area that Kemper seeks to develop a contract illegality based on a "tie-in". However, Kemper's concern was not so much with the questionable value to it of certain stations constituting the "then-going lineup" as it was with stations which might drop the program before or during Kemper's sponsorship of a lineup made up of those "affiliated stations carrying the program as of each telecast." (Pltf. Exh. 7 at 1.)

Mr. DeMark's handwritten notes on ABC's letter of May 10 (Pltf. Exh. 7) expressing such concern are most revealing. An "ordered station lineup" was first mentioned in Kemper's order letter of May 4 (Pltf. Exh. 5), which letter supposedly reflected Kemper's desire to eliminate certain stations from the then-going lineup and which letter had attached an ORDERED STATION LINEUP. In response to this letter, ABC's letter of May 10 referred to a "then-going lineup" although the 28 additional stations to be ordered were specified. Yet nowhere in his notes on this letter does Mr. DeMark mention the unwanted stations—only the possibility that stations in the "then-going lineup"

may drop out. "What happens if a lot of Stat[ions] drop between 6/1 & 10/15"—"What protection if a city now carrying drops". (Pltf. Exh. 7 at 1.) "What happens to N.Y., Chg. Wash.? etc." (*Id.* at 3.) It should also be remembered that at the time Mr. DeMark made his notes sole sponsorship by Kemper had not been decided upon, and, accordingly, he mentioned certain additional products of co-sponsors deemed offensive to or competitive with Kemper. (Pltf. Exh. 7 at 3.) It seems apparent from the documentary evidence in this case that after the "feeler" of May 4, the "unwanted" stations were never a matter of concern to Kemper vis-a-vis its desire to obtain "an ordered station lineup". So a blackout of unwanted stations in a then-going lineup was an alternative to an ordered station lineup when ABC agreed to go back to New York after the May 18 meeting, but the *"unwanted stations" were those that might be added to the lineup in the future,* and it was this blackout of future additions which Kemper succeeded in obtaining in the first instance, as evidenced by the draft of June 1 and the letter of June 5. As has been noted, by the time ABC's rejection of an ordered station lineup, except at rate card, was communicated to Kemper, Kemper had already decided on sole sponsorship of a reduced number of segments, primarily because ABC would not give Kemper the cancellation clause it wanted. Mr. Trude, in his draft of June 1 and letter of June 5, attached on Ordered Station Lineup, Group I of which lists the "then-going lineup", but under the terms of both the draft and letter Kemper was under no obligation to accept additions to that lineup and failure to maintain the ordered "coverage" by ABC was to result in a credit to Kemper "on the applicable time charges". Kemper, accordingly, had now received some protection against stations dropping out of the

lineup prior to or during its "sole sponsorship", and against stations which it did not want subsequently becoming part of the lineup.[30]

Thereafter, except for ABC's telegram of June 12 defining the ordered station lineup (Def. Exh. I at 2), we find all reference to a "then-going lineup" omitted, reference being made to an "ordered station lineup" made up of 3 groups and specifying rate card less a special discount as fixing the applicable time charges. One need only briefly examine the agreement of August 15 to determine whether Kemper was successful in obtaining an ordered station lineup.

Mention has been made of rate card and blackouts in connection with a station lineup, either "going" or "ordered". As for blackouts, only two observations are necessary—nobody attempted to ascertain from ABC what the actual cost of a blackout of already ordered stations would be, and once Mr. Kemper had decided on sole sponsorship the matter became academic. Neither Mr. DeMark's memorandum or handwritten notes of his meeting with Mr. Kemper on May 23, where the decision regarding sole sponsorship was reached, made any mention of blackouts. Nor is the Court impressed with the charges of misrepresentation leveled by Kemper against ABC regarding the cost of such blackouts. By agreeing that Kemper need not take stations subsequently added to the lineup, ABC was, in effect, agreeing to blackout those stations at no cost, so it is difficult to understand why Kemper made no inquiry as to the cost

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[30] Since Kemper apparently circulated promotional material to its representatives in the areas to be covered by the telecast, this practice may constitute a further reason for its desire to have a contract for specific locations which was not liable to fluctuate one way or the other.

of blacking out other stations. Moreover, according to Kemper, it had selected its lineup on other occasions and the Kemper and Frank Agency participants in the negotiations were well informed in the industry, despite their asserted unfamiliarity with "package deals" and "then-going lineups". The Court has already commented on the attempt to characterize statements by ABC associating an ordered station lineup with "rate card" as foreclosing further negotiations. Yet, it is difficult to comprehend how "rate card" can be disassociated from an ordered station lineup if the sponsor is to obtain a fair credit for stations in that lineup which fail to clear or which fail to carry the program on a particular telecast. The Court, however, cannot accept Kemper's interpretation of "rate card" which imputes to ABC the making of an absurd or ridiculous counter-offer in negotiating a sale it was exceedingly anxious to effect. In the various documents where the words appear a special discount is applicable.

As has been noted, the term "an ordered station lineup" could include a lineup made up of both "wanted" and "unwanted" stations, but differing from a "then-going lineup" in that with an ordered station lineup the client is billed the applicable time charges per ordered stations *which are automatically reduced by any non-clearance of stations.* (Def. Exh. I at 2, ¶ 7.) What better way to inject into the negotiations the matter of an ordered station lineup than to order a station lineup that differed markedly from the then-going lineup? Let Kemper obtain an ordered lineup in principle and ABC could bargain for the content of such a lineup. Furthermore, there is no documentary evidence to negative a finding that, after receipt of ABC's letter of May 10 and in no event later than the meeting of May 18, Kemper had abandoned any opposition to the

inclusion of the "unwanted" stations and was directing its negotiations primarily toward an ordered station lineup. In other words, it was the form rather than the content of the lineup with which Kemper was concerned. The absence of reference to unwanted stations in Mr. DeMark's memoranda to Mr. Kemper and his handwritten notes on various contemporaneous documents which have already been referred to herein, give support to such a conclusion. When ABC "went back" to New York after May 18 it was to ascertain whether Kemper could have an ordered station lineup rather than a then-going lineup, but the content of the lineup was no longer in dispute. What Kemper wanted was the "package deal" in so far as cost was concerned, but in the form of an ordered station lineup "on a rate card basis" less the special discount which would bring them in at the "package" figure and this is what they got. As Mr. DeMark noted on the letter of June 25, 1962, this was "what we asked for". (Def. Exh. J at 1.)

Kemper, of course, did not get everything it asked for, but any party to a contract rarely does. It wanted a cancellation clause and it wanted the right to reduce its segment order if certain additional markets did not clear within a certain time period (approximately 30 days from the contract date). When it learned it could not have a cancellation clause, it reduced its segment order from 39 to 26 on a sole sponsorship basis. It wanted a certain time for the Chicago station, that city being Kemper's headquarters. Although it was not completely successful, the time was improved (Def. Exh. D at 4), and under the final agreement of Aug. 15, 1962, failure to meet the specified time schedule for any station permitted Kemper to cancel its sponsorship as to that station on four weeks' prior notice.

Mention has also been made of co-sponsorships involving products competitive with or otherwise offensive to Kemper, a matter apparently of considerable importance to Mr. Kemper. Once Kemper decided on sole sponsorship, the problem of such co-sponsorship within Kemper's program time was eliminated. However, in the final agreement Kemper obtained protection as to adjacent programs and even as to sponsorships on "Evening Report" during any week that Kemper was a sponsor. (Def. Exh. C at 3, ¶ 11.)

That Kemper got substantially what it bargained for contractwise seems apparent from the Frank Agency letter of July 26, 1962, following the "unanimous" vote of Kemper's Executive Committee. Only a partial failure as to the Chicago time is referred to in so far as contract terms are concerned. It is the character of the program with respect to which the Committee has expressed reservations rather than any station lineup. Indeed, the letter speaks of a steady growth of audience, and a maximum number of commercial positions as advantages of the program.

In light of the foregoing it is difficult to conclude that Kemper acted unreasonably in not negotiating further with respect to the lineup. However, Kemper's contention is that it never was willing to accept the "unwanted" stations and that it was unreasonable under all the circumstances to have required Kemper to negotiate further after ABC rejected its May 4 order letter because:

(a) On more than one occasion ABC made it crystal clear to Kemper that it would not sell the 67 stations that Kemper desired to purchase unless Kemper paid more than the price ABC had quoted for the pur-

chase of the 99 stations on its going lineup. (Pltf. Post-Trial Brief at 2.)

The clear weight of the evidence establishes that Kemper never made an offer for the 67 stations. The letter of May 4 does not constitute such an offer, since it ordered 95 stations. Moreover, Kemper, in its May 4 order letter, by asking for credit for 13 non-clearing stations for which no charge was made in the package deal offer, was, in effect, reducing the price of the 95 stations below the package rate.[31]

(b) Kemper claims it attempted to negotiate further after its order was rejected in ABC's letter of May 10 but that ABC determined it would not sell the 67 stations for less than full rate card and further advised Kemper that the cost of blacking out unwanted stations would be exorbitant. (*Id.* at 2.)

However, as has been noted, Kemper never ordered 67 stations, and it is abundantly clear that Kemper decided on sole sponsorship before it ever learned of ABC's alleged determination that full rate card would be charged. Even had Kemper learned of such alleged determination prior to its decision to order the full lineup on a sole sponsorship basis, it thereafter negotiated an ordered station lineup, not at full rate card, but at rate card less substantial discounts without ever attempting to negotiate for a lesser number of stations at those same or any other discounts. Indeed, while Kemper did negotiate on many facets of the

[31] Strictly speaking, it was so reducing the price for the 82 stations which had cleared, or were pending by reason of the credit to be obtained for the 13 which were neither cleared nor pending. It must be remembered that clearance of these 13 stations was unlikely, some of them not even being affiliated with ABC. (T. 94, 216, 385.)

contract between May 4 and August 15, it never made a counteroffer to ABC regarding the lineup after its original order of May 4.[32]

(c) Kemper claims that had Kemper attempted to negotiate further, its efforts would have proved fruitless because ABC had misrepresented the cost and necessity of blacking out the program on the unwanted stations. (*Id.* at 3-5.)

It is not disputed that Kemper never attempted to ascertain what the cost would be. During the period from May until August, Kemper apparently never discovered the alleged misrepresentation that the blackout cost would be exorbitant although agreements which were drafted during that period provided for the blackout of stations not on the ordered station lineup at no cost to Kemper. The present emphasis by Kemper on the matter of "blackouts" is cut from the same cloth as its prior emphasis on "full rate card" now shown not to have been a factor in Kemper's decision to contract for sole sponsorship.[33]

As appears clear from the entire history of the negotiations which has been detailed herein, Kemper held the dominant position at the bargaining table. ABC's difficulties in selling the program have already been discussed and are nowise refuted by Kemper. It is Kemper which set, and refused to extend, the deadline for acceptance

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[32] Certainly, by mid-June and until the contract was executed on August 15, Kemper must have been aware of the so-called "misrepresentations" by ABC as to the meaning of rate card or as to the costs of any "blackout", yet it never made any attempt to reopen negotiations with respect to the "unwanted" stations.

[33] *Id.*

of its terms—Kemper which demanded a cancellation clause and reduced its order by one-third when it was unsuccessful. It is Kemper which demanded additional stations in the lineup and ABC which complied and set a cost figure for these stations at a discount greater than the discount for the original package.[34] While it is true that, for many of the additional stations, clearance was doubtful and involved non-affiliated stations, ABC nevertheless obligated itself to the time and expense of seeking such clearance. The individuals engaged in the negotiations were not novices—rather, they were experienced in negotiations of this type. Whether Kemper's letter of May 4 was written for the purpose of obtaining a contract in the form of an ordered station lineup rather than in the form of a "then-going lineup" is not clear from the testimony herein, but the subsequent documentary evidence supports such an assumption. What is clear is that Kemper made only one offer prior to its decision to take sole sponsorship, that such offer was for 95 stations and was contrary to the prior agreements of the parties, and that it made no effort to ascertain what cost would be involved, either in the form of time-cost or blackout cost, for an ordered station lineup of its own choice. As this Court observed in its prior opinion "[h]aving failed to negotiate a price for the stations it wanted, it cannot employ hindsight to arrive at the cost figure which would have emerged from such negotiations." (270 F. Supp. at 648.) If, as it continues to assert, Kemper was being coerced to take stations it did not want, its failure to negotiate further was unreasonable, and the Court so finds.

The parties hereto may exchange and submit proposed findings of fact and conclusions of law in conformity here-

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[34] See note 31, *supra*.

with within thirty (30) days of the filing of this opinion or, failing such, the foregoing shall constitute the requisite findings of fact and conclusions of law pursuant to Rules 41 and 52, and judgment shall enter dismissing the complaint on the merits pursuant to Rule 58 of the Federal Rules of Civil Procedure.

So ordered.

Dated: New York, New York
March 17, 1970.

CHARLES H. TENNEY
U.S.D.J.

APPENDIX C

Opinion of Court of Appeals Dated August 10, 1971 Affirming Judgment for Defendant (446 F.2d 1131)

(Entered August 10, 1971)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, *et al.*,

Plaintiffs-Appellants,

v.

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Defendant-Appellee.

Nos. 921, 922, Dockets 35133, 35546

Before MOORE, KAUFMAN and TIMBERS,* Circuit Judges.

IRVING R. KAUFMAN, Circuit Judge:

The single issue raised on this appeal from Judge Tenney's dismissal of this antitrust action brought by a group of insurers, commonly known as The Kemper Insurance Companies, was framed by an earlier decision of this Court, reported at 388 F.2d 272 (1967), reversing the district court's previous award of summary judgment to defendant-appellee, American Broadcasting-Paramount Thea-

* Chief Judge of the District of Connecticut, sitting by designation, when oral argument was heard.

tres, Inc. (ABC), 270 F.Supp. 619 (1967), and remanding for a trial on the merits.

Although the previous reported opinions in this case together with the decision appealed from now consume nearly 200 pages in the record and together thoroughly recount every factual detail relevant to the issue presented to us, a further distilled account of those facts we consider decisive to set forth the issue and resolve it will be necessary.

On January 9, 1963, ABC instituted a proceeding in the Supreme Court of New York to recover damages based on Kemper's refusal to adhere to a contract which bound Kemper by its terms to sponsor one night each week for twenty-four weeks ABC's quarter hour early evening news program, the Evening Report." Subsequently the state court struck from Kemper's answer to ABC's complaint Kemper's defense that the contract constituted an illegal tying arrangement under Section 1 of the Sherman Act, 15 U.S.C. § 1. That allegation then became the basis for this present litigation. Kemper seeks to recover as its principal item of damages, to be trebled pursuant to 15 U.S.C. § 15, ABC's ultimate recovery in the state litigation of $328,865.03. Kemper has satisfied this judgment under protest that it represents enforcement of an unlawful agreement.

Plaintiff's antitrust theory is not complex, but due to the nature of the question that the district court found determinative, its resolution required a careful scrutiny of the convoluted negotiations that led to the final entry by the parties into the formal contract whose legality Kemper has put in question. Kemper's contention is that during a segment of those negotiations in the Spring and Summer of 1962, and sometime prior to the signing of the formal contract which is dated August 15, 1962, ABC exerted un-

lawful economic pressure and coerced Kemper to sponsor the Evening Report over several local television broadcasting stations affiliated with the ABC network. The details of the arrangements between ABC and the local stations are set forth in the earlier opinions in this case and shall not be repeated. In sum, it is Kemper's claim that it did not wish to sponsor the broadcasts over these local stations but was forced to do so as a condition to being permitted to sponsor broadcasts over other local affiliates of ABC whose sponsorship was desirable to Kemper.

Judge Tenney originally dismissed the complaint and granted summary judgment for ABC on several grounds, including the only one at issue on this appeal, *viz.*, whether, as Judge Tenney concluded in each of his decisions, Kemper could not have been coerced as it claims because it did not seriously bargain for the elimination of the alleged unwanted sponsorships. Judge Tenney was of the view that Kemper had abandoned its initial attempt to exclude the "unwanted" stations from the agreement and that its judgment was not affected by any manner of "coercion" on the part of ABC, but was attributable entirely to Kemper's bargaining strategy. On the appeal from Judge Tenney's grant of summary judgment, we found a "genuine issue of fact" presented with respect to each of the rationales for the dismissal at that early stage of the litigation, and thus were required to remand for a full trial. On remand, Judge Tenney adopted the suggestion made, in our opinion which reversed the dismissal, that judicial economy would be served were he to try separately at the outset the question whether "Kemper's refusal to negotiate" further and more vigorously than it did the question of eliminating unwanted stations "was unreasonable," or whether to the contrary

Kemper "reasonably" decided that any attempt to bargain further would have been futile.

Following a three-day trial on this question, Judge Tenney filed a thorough and careful opinion. He found that Kemper "acted unreasonably in failing to negotiate further with ABC in this regard after May 18, 1962," admittedly the last date that Kemper broached the idea of eliminating undesirable stations to ABC. With one exception which we deem immaterial,[1] Kemper does not now contend that any of Judge Tenney's subsidiary factual findings are "clearly erroneous," F.R.Civ.P. 52(a). Rather, its position is that Judge Tenney applied erroneous principles of law and that in any event his ultimate conclusion is unsupported by the underlying facts and findings.

We disagree and affirm the judgment below.

I.

A. *Preliminary Negotiations*

The negotiations that resulted in the August 15, 1962 contract unfolded in three stages. A period of primarily verbal and informal written communications began January 25, 1962, with a preliminary oral offer by a representative of ABC and ended May 4 when Kemper sent ABC a more detailed and formal "order letter." It is interesting that prior to the May 4 letter, the negotiations had not focused on the question whether Kemper would sponsor each of ninety-nine local affiliates of ABC which at that

[1] Kemper alleges that Judge Tenney misconstrued the precise events at an important meeting on May 18, 1962, which we briefly describe below. Assuming Kemper's version of the facts were correct, we are of the view that it would not affect Judge Tenney's reasoning or conclusion, nor does it affect ours.

time had "cleared," i. e. agreed to carry, the "Evening Report." The incidental character of the question whether the ninety-nine stations "then going lineup" might be more extensive than optimally desirable to Kemper is indicated by the nature of a formal recommendation, known as the "Silver Report," prepared by Buckingham W. Gunn, senior vice-president and director of broadcasting services of Kemper's advertising agency, Clinton E. Frank, Inc. (the Frank Agency). Gunn prepared the Silver Report prior to an important meeting between ABC, Kemper and Frank representatives which was held on April 17, 1962. Appended to the report were three lists of broadcasting stations, one consisting of the ninety-nine station cleared lineup, one of fifteen other stations whose clearance was then described as "pending," and the third of thirteen additional stations listed as "non-clear." The twenty-eight stations on the two supplemental lists were located in areas that Kemper had earlier identified internally as desirable advertising markets. Throughout the negotiations, Kemper bargained intensively to protect its interest in these twenty-eight stations and indeed succeeded in substantial part in doing so in the final contract.

The body of the Silver Report included an expression of hope that all of the twenty-eight desirable stations would be cleared, but indicated doubt that the thirteen "non-cleared" stations would carry the news program. There was no mention in the body of the report of any unwanted stations, and thus, of course, no suggestion either that the existence of some superfluous outlets would render the sponsorship agreement materially less desirable to Kemper. Although twenty of the ninety-nine stations on the appended list of cleared stations were marked with asterisks as "markets Kemper does not want," those twenty

outlets had apparently been identified by telephone to Gunn's secretary only a day or so before April 17 by Mr. DeMark, Kemper's advertising manager, after reviewing the cleared list and speaking "off the top of * * * [his] head." Thus, the Frank Agency seems to have formulated its initial recommendation considering it not an important factor, and indeed with only casually recognizing the issue that there were included some unwanted stations on ABC's then-going lineup.

Later events are entirely consistent with the conclusion that Kemper never viewed the exclusion of unwanted stations as material to the negotiations. Participants at the April 17 meeting were unclear in their testimony and in written submissions to Judge Tenney about the extent that undesirable stations were discussed at that time, although their presence in the ABC lineup was at least pointed out by ABC and Frank Agency officials. But it is agreed that the discussion at that meeting centered primarily on other issues that clearly were of major interest to Kemper, especially the problem of the twenty-eight desired but not yet cleared stations and also some difficulty with the broadcast time of the Evening Report in Chicago.

These two issues were similarly DeMark's prime concern as reflected in a letter addressed by him to Mr. Kemper dated April 18 reporting the results of the meeting the day before. This letter made no mention of any unwanted stations, but did recommend that Mr. Kemper intercede to persuade ABC to adjust the Chicago broadcast time and to arrange acceptable terms with respect to the twenty-eight desired but uncleared stations.

B. *Negotiations Following Kemper's May 4 Order Letter*

After April 27, Frank Agency officials, working with a more authoritative and definitive list of unwanted advertising markets, based on a study of Kemper's volume of business and of the audiences of the stations in question, identified thirty-two of the ninety-nine station ABC going lineup which it contends in this litigation were superfluous to its advertising program. These stations were deleted from those requested for sponsorship in Kemper's May 4 order letter, which initiated a second more formal stage of the bargaining by proposing that Kemper sponsor the Evening Report on ninety-five specified stations, sixty-seven from ABC's then-going lineup and the additional twenty-eight which had been the subject of the earlier discussions. It is significant that the price per quarter-hour segment offered by Kemper in its May 4 letter based on its own optimal lineup of ninety-five stations did not differ significantly from the price offered by ABC and apparently agreed upon in principle by Kemper at the April 27 meeting.[2] Thus, Kemper's May 4 offer did not suggest that it anticipated any monetary advantage to accrue were the unwanted local broadcasts "blacked out" from Kemper's sponsorship.

Whether or not, as seems likely and as the district court suggested, the May 4 offer represented only a ploy intended to strengthen Kemper's bargaining hand and calculated to enhance its chance to secure those terms that were truly

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[2] The details of the terms of the May 4 offer, those discussed at the April 27 meeting, and those evolved through later negotiations, as well as relevant but not central events unnecessary to setting forth the grounds for our affirmance, may be found in the earlier opinions in this case.

important to it, the casual and incidental formulation of the schedule of unwanted stations prior to May 4 substantially supports the district court's conclusion, especially in light of later events, that Kemper subsequently abandoned this issue after ABC offered an initial negative response, without any coercion by ABC. ABC's initial response was indeed, as might well have been expected, decidedly adverse, but there is no evidence that this reaaction ever crystallized into any identifiable or reasonably definitive policy within ABC. There was evidence, in fact, that even Gunn himself was somewhat surprised by the May 4 letter (which appears to have been largely DeMark's product), when he was told of the terms by Mr. Beebe, an ABC official, who at that time commented vaguely to DeMark that to black out stations "would cost" and that ABC "would have to renegotiate" the contract.

The events following this first Beebe-DeMark communication are undisputed and may be briefly stated. In response to the May 4 letter, Mr. Hede, a vice president and administrative sales manager for ABC in New York, informed Mr. Arne Nordmark, sales service manager for ABC in Chicago, that Kemper's truncated list of sixty-eight then-going stations could only be purchased at "rate card." "Rate card" indicated a charge based primarily on ABC's schedule of payments to its local affiliates for their broadcasts of network programs sponsored by national advertisers. These rates would have represented approximately a ninety per cent increase over the price previously negotiated by ABC and Kemper and which was the basis for Kemper's May 4 letter.

On May 10, 1971, ABC formally replied to Kemper with a counteroffer adopting many of the terms of the May 4

letter, including the total per segment price, but substituting the full ninety-nine stational lineup for Kemper's sixty-seven. As Judge Tenney found, since ABC's offer requested virtually the same price that Kemper itself had been willing to pay for twenty-eight fewer stations, almost any blackout charge for eliminating the unwanted stations would probably have been too expensive for Kemper.

Moreover, at a key meeting on May 18 among officials of all three of the concerned companies, ABC told Kemper that the cost of blackouts would be "exorbitant." Kemper does not claim that this characterization represented a firm ABC position, but merely that ABC agreed to consult further with officials in its New York office as to the feasibility and price of selective blackouts. Prior to receiving any more definite word on this issue, however, DeMark on May 21 mailed Mr. Kemper a recapitulation on the progress of the talks, which again ignored the issue of the unwanted stations. DeMark now expressed primary concern about possible undesirable co-sponsors with Kemper. At a meeting on May 27 Kemper and DeMark resolved this new problem to their own satisfaction and in a memorandum dated May 28 Mr. Kemper agreed that Kemper should proceed to negotiate a final contract. There is no evidence that the question of eliminating stations was a condition of, or even was an issue that bore upon this understanding. It was only subsequent to this decision to negotiate a final contract without regard to the elimination of unwanted stations, that Nordmark told DeMark that Kemper could have the abbreviated Kemper lineup at "rate card." Thus, as Judge Tenney found, "it now appears clear that Mr. DeMark did not hear that ABC would not give Kemper its own lineup of 95 stations unless they 'went rate card,' until after Kemper had made the decision to order the then-going lineup."

C. *Negotiations After Kemper Abandoned Its Lineup*

Subsequent to May 18, as we have said, Kemper did not again suggest that ABC eliminate any stations from its then-going lineup. Specifically, it never attempted to secure from ABC a statement of the *cost* to ABC of blacking out the unwanted stations. This failure to press the issue of cost is particularly conspicuous in the light of Kemper's intensive bargaining to secure an option, which it did in fact secure, to pick and choose which stations to sponsor among those that might clear the Evening Report after the contract was concluded. The final contract vested in Kemper "the right to accept or reject any additional station to the [then-going] lineup * * *." To this must be added Judge Tenney's finding in his first opinion in this case, that "it was ABC's practice to negotiate with advertisers a final price at a *further discount* from the offering sheet prices [the price based on 'rate card' plus certain volume discounts], and that television network prices are negotiated prices." 270 F. Supp. at 624. In view of the fact that ABC had already offered Kemper a very substantial discount over rate card to induce it to sponsor Evening Report, Kemper could reasonably anticipate that ABC would yield substantial ground from its initial "rate card" position had Kemper pressed the point. But as is apparent from all the above, Judge Tenney was entirely justified in finding that ABC did not coerce Kemper to break off talks about its ideal lineup because "after the 'feeler' of May 4, the 'unwanted' stations were never a matter of concern to Kemper * * *."

II.

Kemper argues that, even accepting the facts as stated above as accurate, ABC must nonetheless be found to have coerced it into accepting an unlawful tying arrangement on the principle, as formulated by Kemper, that "whenever [a seller] offers a buyer a package; the buyer states he only wants certain items in the package, and the seller delays *at all* in offering to sell the designated items at prices which are equivalent to the package price," taking into account any costs saved by selling the entire package, then the seller violates Section 1 of the Sherman Act (emphasis added).

We find this sweeping proposition untenable, for reasons that may be illustrated by Kemper's misplaced reliance on the *remedy* granted to the plaintiff in United States v. Loew's, 371 U.S. 38, 53-55, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962). That the Court there included in its order a proscription against any delay in "producing individual prices" for motion picture films is not relevant here as demonstrated by the Court's careful dissociation of the remedial measures there adopted, after a violation had been made out, from activities prohibited by the Sherman Act in the first instance:

> "Some of the practices which the Government seeks to have enjoined with its requested modifications [which the Court granted] are acts which may be entirely proper when viewed alone. To ensure, however, that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined." *Id.* at 53, 83 S.Ct. at 106.

In *Loew's* the "acts found to be illegal" were those of motion picture distributors who conditioned the license and sale of feature films on the acceptance of unwanted or inferior files. The "gravamen" of the complaint was the "*successful pressure* applied to television station customers to accept inferior films * * *." *Id.* at 40, 83 S.Ct. at 99 (emphasis added). Here, ABC exerted no pressure on Kemper, successful or not. We agree that it is not decisive, as Kemper correctly asserts, that Kemper found the August 15 contract economically advantageous given the available alternatives, since that is a necessary characteristic of most contracts, including illegal ones. But there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice.

Tying arrangements are abhorred by the courts primarily because they foreclose a substantial quantity of business to competitors and extend pre-existing economic power to new markets for no good justification. See Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 500-501, 89 S.Ct. 1252, 22 L.Ed. 495 (1969). Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie. To adopt Kemper's position would subject businesses to threats of antitrust sanctions whenever they tried by bravado to buttress a sagging market position by initially offering small quantities of desired goods at high prices, in hopes of eliciting a large order without further negotiation. Such bartering ploys are not generally the concern of antitrust laws.

In this case, ABC's initial amorphous negative response to Kemper's May 4 letter undoubtedly exercised at least a

marginal influence on Kemper's decision to pursue that tack no further. But Kemper was uninterested in paying *any* significant additional fee for blacking out unwanted stations and for this reason among others it never sought or received a reasonably firm ABC offer for the Kemper lineup. We commented in remanding this case for trial that the antitrust laws do not require "joust[ing] with windmills." 388 F.2d at 285. It is not apparent, to turn the metaphor, that Kemper never discovered whether it faced a windmill or a bona fide giant. ABC's preliminary bargaining position may have influenced Kemper, but Kemper did not persevere long enough with its ideal lineup to feel any economic pressure from ABC, and we cannot know whether ABC would ever have tried to bring any such pressure to bear.

The judgment is affirmed.

APPENDIX D

Judgment of Court of Appeals Dated December 15, 1967, Reversing District Court

(Entered December 15, 1967)

No. 133, Docket 31528

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of December one thousand nine hundred and sixty-seven.

Present:

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,

Circuit Judges.

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, FEDERAL MUTUAL INSURANCE COMPANY, and LUMBERMENS MUTUAL CASUALTY COMPANY,

Plaintiffs-Appellants,

—v.—

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings consistent with the opinion of this court with costs to the appellants.

A. Daniel Fusaro,
Clerk.

APPENDIX E

Judgment of Court of Appeals Dated August 10, 1971 Affirming District Court

(Entered August 15, 1971)

(Nos. 921 and 922. Docket Nos. 35133 and 35546)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of August one thousand nine hundred and seventy-one.

Present:

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE CO., FEDERAL MUTUAL INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY,

Plaintiffs-Appellants,

—v.—

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-621

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, FEDERAL MUTUAL INSURANCE COMPANY and LUMBERMENS MUTUAL CASUALTY COMPANY,

Petitioners,

—against—

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 29, 1971

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IN THE

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Petitioners,

—against—

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Question Presented

Where the District Court and the Court of Appeals found no factual basis for the assertion of a tie-in or for

any other violation of the antitrust laws and the petitioners cannot show that such findings were erroneous as a matter of law does the petition come within any consideration referred to in Rule 19 of the rules of this Court?

Statement of the Case

Erroneous assumptions of fact in the "Question Presented" by the petitioners (collectively hereafter referred to as "Kemper"), as well as distortions and omissions of pertinent facts in the petitioners' Statement of the Case, compel a further statement by the respondent (ABC).

The fragmented Statement of the Case as presented by Kemper does not reveal the extended negotiations between the parties and the facts and circumstances which led to the signing of the subject contract. The opinions of the District Court (B. 1) and the Circuit Court (A. 1, C. 1) as well as the opinion of the District Court granting summary judgment (*American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 270 F. Supp. 619 (1967)) painstakingly discuss all the relevant facts and repetition thereof would serve no useful purpose.

Accordingly, to place this case in proper focus, only a brief factual statement is necessary.

In January, 1962 when Kemper was shopping for television advertising, it was given an initial package price of $22,000 per telecast for sponsorship of the news program entitled, "Evening Report", over ABC's then "going lineup" (consisting of approximately 99 stations at the time the offer was made) which was based on a special 47½ per cent discount from ABC's published rate card time charges for the stations comprising the lineup. There-

after, on May 4, 1962 Kemper offered to sponsor the program over its own tailored lineup of 95 stations, only 67 of which were carrying the program at a price of $24,250 which Kemper computed by applying the 47½ per cent package price discount. What it did was to eliminate 32 of the stations on the then going lineup and substitute 28 stations which were more valuable and expensive than the 32 stations eliminated.

After the extensive negotiations and correspondence between the parties a written contract dated August 15, 1962 was signed pursuant to which Kemper agreed to sponsor one program per week over a 26-week period beginning October 17, 1962. The lineup referred to in the contract was neither the original one offered by ABC nor the one appearing in the May 4, 1962 order letter, but rather a compromise lineup which emerged from the negotiations.

Under Kemper's sponsorship the program Evening Report was broadcast on October 17, 26, 31 and on November 9, 1962 (270 F. Supp. 619, 636), after which Kemper deliberately and unlawfully breached the agreement.

Three telecasts wherein Kemper appeared as the sponsor occurred before September 9, 1962. Kemper paid for such telecasts without objection and certainly without any suggestion that the contract was in violation of any antitrust law. In fact, as late as two months after the cancellation of the contract Kemper never complained of any illegal tie-in sale and the first time the claim was asserted was in the answer Kemper interposed in the New York State Supreme Court action which was brought for non-payment of the November 9, 1962 telecast and for damages for anticipatory breach of contract as to the bal-

ance of the contract term.* The charge by ABC that Kemper's belated assertion of an antitrust violation was concocted was only casually noted by the Court of Appeals when it said, "In light of the history of the Kemper-ABC agreement one may suspect that the claim of Sherman Act illegality was an afterthought to justify having broken a contract that had turned sour" but otherwise was almost totally ignored from a realistic point (A. 12) although perhaps technically correct. The fact remains that Kemper was able to reach back into the history of the negotiations and pick out one item upon which it predicated the charge that the antitrust laws were violated in that Kemper at one period during the lengthy negotiations said it did not want 32 stations in the "going lineup". Whether the latter was a matter of serious concern to Kemper or mentioned only in the early stages and dropped because of the other beneficial results Kemper obtained in the give and take of the bargaining, or whether it was only a negotiating ploy to obtain a better contract, in the final analysis were questions of fact which have been found adversely to Kemper's contentions.

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* In Kemper's petition the footnote on page 5 refers to the application before this Court for a writ of certiorari to the New York State Court of Appeals in *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.* 385 U. S. 931 (1966), which finally terminated the State Court action. Kemper then says: "Thus this is not a case where a promisor is attempting avoiding paying an agreed price for a consideration the promisor had actually received" but the latter statement must be placed in its proper context. Kemper's resistance is obvious from a mere listing of the various steps taken in the litigation itself. Moreover, this action was filed at the same time as the State Court action. While it may be interesting to speculate about the impact of *Kelly* v. *Kosuga*, 385 U. S. 516 (1959), upon this back door approach, we need not consider the problem in view of the findings of fact herein.

ARGUMENT

The findings of fact made by the District Court and affirmed by the Court of Appeals remove from this case any precedential significance.

The decision of the Court of Appeals which affirmed the factual findings of the District Court is (a) certainly not in conflict with the decision of any other Court of Appeals, (b) not one which has decided an important federal question, and (c) not one which has so far departed from the usual course of judicial proceedings, or so far sanctioned such a departure by a lower court. On the contrary, the "nearly 200 pages" of opinions which "recount every factual detail" (C. 2) indicate the careful study made of the facts by the District Court and the Court of Appeals and the indulgent opportunities afforded Kemper to sustain the after-the-fact concocted charge of an antitrust violation.

Kemper now seeks to avoid the effect of the adverse findings of fact by a number of transparent distortive contentions.

Kemper postulates its petition on the claim that there were "repeated demands throughout a month" that ABC eliminate from the ABC station lineup 32 of the 99 ABC affiliated stations carrying Evening Report (pp. 3 and 4 of petition). The negotiations in fact lasted over a period of six months beginning with January 25, 1962 (B. 4) and ending with the signing of the contract dated August 15, 1962 (B. 44). The District Court and the Circuit Court considered the demands in the context of the overall negotiations and did not confine their consideration of the facts to a period "throughout a month".

Kemper also asserts that "ABC conditioned the sale of Evening Report to Kemper over the desired stations

on Kemper's purchase of Evening Report over the 32 unwanted stations" (p. 4 of petition). The fact is that ABC had a news program already on the air over an existing lineup of stations with other sponsors and it offered Kemper the "going lineup" at a package rate. Kemper then submitted a counter-offer in a letter dated May 4, 1962 which the District Court found was "a radical departure from ABC's offer" (B. 53).

On page 14 of the petition Kemper says: "This Court has made clear that what constitutes a combination within the meaning of the Sherman Act is so much a matter of law, rather than fact, that the Court will reverse not only a District Court, but also a jury finding as to the existence of a combination once certain facts are shown". Assuming the latter statement is correct, petitioners have failed to bring themselves to the "once the facts are shown" point.

Kemper then asserts on page 15: "The decisions below would valuate tie-ins unless there is a showing that the buyer persevered to some undefined degree in demanding selectivity, even after the seller refused to break the package into component parts." In the first place the statement assumes that there was a tie-in. Secondly, the statement assumes that the buyer persevered to any degree in demanding selectivity and, thirdly, it assumes that the seller refused to break the package into its component parts. On all these matters the District Court and the Circuit Court found petitioners' case factually insufficient.

Kemper, on page 15, says: "Here the Circuit and District Courts focused on such subjective factors as Kemper's motives, the degree of Kemper's desire not to buy the unwanted stations, Kemper's 'real objectives,' its dili-

gence in persevering and the reasonableness of its failure to persevere after May 23, 1962." Neither Court "focused on such subjective factors" but rather considered the totality of all the evidence, oral and written, direct and circumstantial, expressed and inferred, and subjective and objective.

Based upon the entire record which both Courts had before them it was clear to them as it is to anyone reviewing the evidence that Kemper's claim, that it only wanted 67 stations in the "going lineup" which it accepted only because its "perserverance" had failed, is contradicted and rendered incredible in light of the following salient facts:

(a) The negotiations lasted over a period of about six months (B. 4, 44);

(b) In January, 1962 Kemper was offered, at a package rate, the sponsorship of a news program which was already on the air five days per week with other sponsors for certain days over a "going lineup" of stations (B. 5);

(c) On May 4, 1962, Kemper submitted a counter-offer of an "ordered station lineup" which was a radical departure from ABC's offer (B. 53) and which was prepared for bargaining purposes by Kemper's employee, De Mark, "from the top of his head", but it was not a major concern; price was the important factor (B. 8, 9, 10, 11, 13, 14, 20, 42, 50, 58 and 67);

(d) Kemper never made an offer for the 67 stations it now claims it wanted (B. 74);

(e) Kemper during the entire period was represented by an advertising agency, had an employee who was its own advertising manager and "the individuals

engaged in the negotiations were not novices—rather, they were experienced in negotiations of this type." (B. 76);

(f) In the negotiations Kemper had the dominant bargaining position for the following reasons:

(1) ABC was "distinctly third" among the three networks in the area of news (B. 65);

(2) The program was difficult to sell and in fact was a "Turkey" (i.e., unsuccessful) (B. 65);

(3) ABC was having trouble selling the program as late as July of 1962 and the closer to air time the more advantageous it was to get a good deal, particularly when Kemper knew ABC had not sold all the availabilities (B. 65); and, in fact, the sponsorship contract was not signed until August 14, 1962, or about one month before air time;

(g) After Kemper had obtained various concessions from ABC the so-called "unwanted stations" were not mentioned (B. 10, 11, 14, 16, 29, 31, 37, 44) and "the primary emphasis was on additional markets" (B. 50, 52);

(h) Even after the sponsorship contract was signed, if Kemper had in fact been coerced, it could have repudiated the contract.

Kemper, aside from squirming to avoid the effect of the findings of fact, also shifts its position as is readily apparent from the argument made on page 17 of the petition that "the decision below is squarely contrary to the many decisions of this Court that have found that economic pressure is not necessary to proof of an illegal tie-in". This desperate attempt to reach for an issue is al-

most duplicitous. Kemper itself vehemently urged in Point I of its brief filed with the Court of Appeals that economic coercion was exercised over it in procuring the contract and devoted seven printed pages to a discussion of that very contention which it summed up in its own words as follows: "Whether Kemper should have negotiated further turns on whether ABC's response to Kemper's demand to eliminate 32 of the 99 stations from the 'Evening Report' lineup was coercive". Kemper also argued before the Court of Appeals that the District Court erred in that "It approached the coercion issue as if it were dealing with that kind of coercion that would void a contract at common law" (page 18 of Kemper's brief to the Court of Appeals dated April 7, 1971). Kemper spoke of coercion in "the antitrust tie-in sense" and as "economic coercion". When the District Court found and the Circuit Court answered Kemper's argument by stating that there was no coercion in any sense, Kemper now changes its tune and argues before this Court that economic pressure is not a necessary element in a tie-in.

Kemper goes on and simply concludes that there was an illegal tie-in which should have been ruled as a per se violation. It then relies upon inapplicable and inapposite cases decided by this Court based upon totally different factual situations. In *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1 (1958), this Court noted that "the essential prerequisites for treating the defendant's tying arrangements as unreasonable per se were conclusively established below" (p. 8). In the present case the District Court and the Court of Appeals not only found no "essential prerequisites" but actually found no factual basis whatever for concluding, as Kemper does, that there was a tie-in.

In *International Salt Co., Inc.* v. *United States,* 332 U. S. 392 (1947), it was similarly held that there existed

the "essential prerequisites" for concluding that the contracts in question which required lessees of patented machinery to purchase salt from the lessor despite certain ameliorating clauses did "not avoid the stifling effect of the agreement on competition" and also gave the lessor "a priority on the business at equal prices. A competitor would have to undercut appellant's price to have any hope of capturing the market" (p. 397). It thus becomes almost wearisome to repeat that no such contractual or factual considerations were found by the courts below to have existed in the present case. Both of the aforesaid cases were government antitrust prosecutions where per se violations were involved.

The Court of Appeals in its opinion discussed *United States* v. *Loew's Incorporated,* 371 U. S. 38 (1962) and *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U. S. 495 (1969) and held both distinguishable on the facts. Moreover in *Fortner* this Court merely held that sufficient evidence was present to require a trial. The negotiations conducted by the parties in the instant case were on a different footing and the Court of Appeals commented as to the offers and counter offers made during the negotiations that "bartering ploys are not generally the concern of antitrust laws" (C. 12).

Taking quotations from other cases decided by this Court as Kemper does throughout its petition serves no useful purpose because they must be viewed in the context of each opinion.

The fact remains that Kemper never reached the first plateau of establishing the "essential prerequisites" to sustain a tie-in charge. It failed to show that Kemper was subject to tie-in conditions of any kind, legal or illegal, reasonable or unreasonable, and it failed to show factually that it was subject to coercion of any type. The